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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-52

****

GLOYD A. VESTAL, PETITIONER

vs.

STATE OF NORTH CAROLINA, RESPONDENT

****

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. _____

GLOYD A. VESTAL, Petitioner

vs.

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioner, Gloyd A. Vestal, respectfully petitions this Honorable Court to issue its writ of certiorari to the Supreme Court of North Carolina to the end that this Court may review the decision of the Supreme Court of North Carolina affirming the petitioner's conviction in the Superior Court of Caswell County, North Carolina, of manslaughter, and affirming the judgment of the Superior Court of Caswell County, North Carolina, that the petitioner be imprisoned for eighteen to twenty years.

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina which is sought to be reviewed here

appears as follows:

Number Below: 7217SC 839
Citation: STATE v. VESTAL, 283 N.C. 249, 195 S.E. 2d, 297
Appendix page: 185

An earlier trial and conviction of petitioner in the same case was set aside by the Supreme Court of North Carolina in an earlier appeal. That earlier decision of the Supreme Court of North Carolina is pertinent here. It appears as follows:

Number Below: 7018SC652
Citation: STATE v. VESTAL, 278 N. C. 561, 180 S.E. 2d 755
Appendix page: 52

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

The date and time of entry of the judgment below of which review is sought is April 11, 1973.

No rehearing in this criminal case is available in the courts of North Carolina.

Petitioner is at liberty on bail pending final determination of this case.

Petitioner contends that his conviction was procured on the basis of evidence obtained in unlawful searches of his warehouse in violation of his rights under the Fourth Amendment to the United States Constitution and under the Due Process Clause of the Fourteenth Amendment

to the United States Constitution.

Petitioner further contends that because in his first trial, and in the decision of the Supreme Court of North Carolina reviewing that first trial, it was finally adjudicated that the crime involved in this case was not manslaughter and that the petitioner could not be convicted, on the evidence in this case, of manslaughter, his subsequent conviction of manslaughter upon the same evidence violates the petitioner's rights under the Fifth Amendment and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and under the doctrines of double jeopardy and of collateral estoppel.

QUESTIONS PRESENTED

1. Were the searches of the petitioner's warehouse, which produced the evidence upon which he was convicted, unlawful and violative of his rights under the Fourth Amendment and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that:

   A. The search on June 28, 1969, by police officers was without a search warrant; without the petitioner's consent given freely and lawfully, and without petitioner being given proper warning by the police officers of his right to refuse the search.

   B. The search on July 18, 1969, was under an unlawful search warrant for that:

(1) It in turn was based in part on the unlawful search of June 28, 1969.

(2 The affidavit upon which the search warrant was procured did not set forth facts constituting a basis for finding probable cause that the items listed as objects of the search would be found in the warehouse.

(3) The affidavit by a police officer was based on hearsay evidence unsupported by any evidence that the source thereof was reliable or credible.

(4) That affidavit was in fact based upon double hearsay in that the affiant relied upon information received as hearsay from another officer who in turn received the information as hearsay from other persons not shown in any way to be reliable or credible?

2. Was the conviction of the petitioner of manslaughter in his second trial on the same indictment for murder in violation of his rights under the Fifth Amendment and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under the doctrines of double jeopardy and of collateral estoppel for that it had previously been finally adjudicated in this case that the crime involved was not manslaughter and that he could not be convicted of manslaughter upon the evidence in this case, which evidence was the same in both trials?

PROVISIONS OF THE UNITED STATES CONSTITUTION INVOLVED

Fourth Amendment to the Constitution of the United States

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the person or things to be seized."

Fifth Amendment to the Constitution of the United States

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; not shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Due Process Clause, Fourteenth Amendment to the Constitution of the United States

"1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On or about June 15, 1969, one Pennisi, a former business associate of the petitioner's, disappeared from Greensboro, North Carolina. The petitioner told police officers that he had seen and talked to the missing man sometime about 7:30 to 8:00 P. M. on that date. (Record Case No. 7018SC652, Pages 81, 97; Record Case No. 7217SC839, Page 60.)

On June 21, 1969, the missing man's body wrapped in chains and in a gold-colored drape, was found in Lake Gaston in Virginia. (Record Case No. 7018SC652, Pages 41-66; Record Case No. 7217SC839, Pages 10-18.)

On June 28, 1969, the petitioner went to the Greensboro, North Carolina police department, frightened and upset to the point of tears, seeking protection for his children against whom

threats had been made. (Record Case No. 7217SC839, Pages 77, 81, 91.)

He talked to and sought protection from Police Captain W. H. Jackson and Police Lieutenant W. J. Gibson of the police department. At their request he then permitted them to enter and look around his warehouse. They did not warn him that he was a suspect and that they were in fact searching for evidence which could be used against him, or that he need not submit to the search. (Record Case No. 7217SC839, Pages 77, 79, 81, 82, 83, 91, 92.)

While in the warehouse the officers observed stains and, at their request, were permitted by petitioner to take three gold-colored drapes, similar to the one already taken from the body of Pennisi for the purpose of comparison with the one found on the body, all of which were subsequently used by the state to convict the petitioner. (Record Case No. 7217SC839, Pages 77, 78, 83, 92, 93, 94, 95.)

Thereafter, on July 18, 1969, Police Captain W. H. Jackson executed before a magistrate the following affidavit as the basis for obtaining a search warrant for the search of petitioner's same warehouse:

> "Captain W. H. Jackson, Greensboro Police Department, being duly sworn and examined under oath, says under oath that he has reliable information and reasonable cause to believe that Gloyd A. Vestal has on his premises certain property, to wit: fibers, blood-stains, hairs, body fluids, drapes, personal effects of Angelo S. Pennisi,

which constitute evidence of a felony, to wit: murder in the first degree, and blunt instruments which were used in the commission of a felony, to wit: murder in the first degree. The property described above is located on the premises described as follows: Vestal's Flower and Gift Shop Warehouse, 1214 East Bessemer Avenue, Greensboro, North Carolina, next to G.I. 1200.

"The facts which establish reasonable ground for issuance of a search warrant are as follows:

> "Angelo Salvatore Pennisi disappeared from Greensboro, North Carolina, sometime after 7:05 P.M. on June 15, 1969. He was last seen alive by his family at that time.
>
> "The body of the said Pennisi was recovered at approximately 7:00 A.M. on June 21, 1969, in Lake Gaston, Mecklenburg County, Virginia, near the North Carolina line, bearing evidence of obvious murder. The fully dressed body had severe head wounds and was wrapped in a gold colored drape approximately 60" x 79-1/2" in size and was bound around the body by chains.
>
> "On June 19, 1969, Gloyd A.

Vestal claimed to Detective D. G. Jenkins of the Greensboro Police Department that he had been with the said Pennisi at approximately 8:00 P. M. on June 15, 1969, in Greensboro, North Carolina at 2205 Marston Road, Vestal's home.

"On July 16, 1969, Mr. and Mrs. David Clapp and others related to Lieutenant W. J. Gibson, Greensboro Police Department, that they knew Pennisi by sight and recognized him in the immediate vicinity of Vestal's Flower and Gift Shop, Summit Shopping Center, Greensboro, North Carolina at approximately 8:00 P. M. on June 15, 1969.

"On June 28, 1969, at approximately 3:15 P. M., after having invited police to accompany him to his warehouse at 1214 East Bessemer Avenue, Greensboro, North Carolina, Gloyd A. Vestal voluntarily turned over to Captain W. H. Jackson of the Greensboro Police Department, three (3) gold colored drapes which were located in said warehouse. These drapes, together with the gold drape which covered Pennisi's body at the time it was found on June 21, 1969, were submitted to the F. B. I. laboratory in Washington, D. C. for examination and the drapes from Vestal's warehouse were found to be similar in construction, composition, and design to the drape which

was wrapped around the body of Pennisi when it was recovered.

"Pennisi was not seen alive by any known witness after the Clapps and others saw him on June 15, 1969, at approximately 8:00 P.M.

"On July 14, 1969, Gloyd A. Vestal, after being fully warned of his constitutional rights, disclosed to Captain W. H. Jackson that Pennisi had a key to the warehouse at 1214 East Bessemer Avenue and had free access thereto.

"The warehouse at 1214 East Bessemer Avenue, Greensboro, North Carolina, is located only two (2) city blocks from Vestal's Flower and Gift Shop in the Summit Shopping Center, Greensboro, North Carolina.

/s/ W. H. Jackson
(Affiant)."

(Record Case No. 7018SC652, Pages 37-39; Record Case No. 7217SC839, Pages 8, 9, 10; Appendix Page: 22.)

On the basis of that affidavit, the magistrate issued a search warrant containing the following language:

"Whereas information has been furnished me by the affiant named on the attached affidavit (and by the witnesses whose names are listed below), who stated

under oath that Gloyd A. Vestal has property described in the attached affidavit and connected in the manner described in the attached affidavit with the commission of a felony, also described in the attached affidavit. Such property is located as described in the attached affidavit. Whereas I have examined under oath the affiant and such other witnesses as are named below and am satisfied that there is probable cause to believe that the named person has such property on his premises described in the attached affidavit, you are hereby commanded to search the premises for the property in question. If this property is found, seize it and keep it subject to court order. Herein fail not and of this warrant make due return.

"Issed this 18th day of July, 1969, at 2:42 P. M., all of whom are named below:

/s/ W. H. Jackson
(Affiant)."

(Record Case No. 7018SC652, Pages 37-39; Record Case No. 7217SC839, Pages 8, 9, 10; Appendix Page: 22.)

On the same day the search warrant was served by Captain W. H. Jackson upon petitioner, and over petitioner's objection, petitioner's warehouse was searched. (Record Case No. 7217SC839, Pages 8, 9, 10, 96, 97.)

The police seized the following items in the search of the warehouse:

"1-Stains resembling blood taken from the wall on the north end of the room that is entered from the west outside door

"2-Samples of stains resembling blood taken from the ceiling at the north end of the room entered from the west outside door

"3-Stains resembling blood on wood that formed a part of the north wall of the room entered by the west outside door

"4-Stains resembling blood on wood that formed a part of the west wall located at the north end of the room that is entered by the west outside door

"5-Stains removed on a chip of wood, chip being taken from the inside of the door that has previously been referred to as the west outside door. The chip coming from the area of the inside handle

"6-One broom taken from the warehouse area of said building

"7-One gold colored drapery taken from the room at the north end of the building, where furniture and other items are stored

"8-Hairs taken from the walls at the north end and northwest corner of the room entered by the west outside door

"9-Automotive lug wrench taken from floor next to the west wall of the building near the inside door leading to the room that is entered by the west outside door

"10-One piece of leather resembling part of a broken belt taken from the room at

north end of the building."

(Record Case No. 7018SC652, Pages 38, 39; Record Case No. 7217SC839, Pages 8, 9, 10. Appendix Page: 22.)

On October 1, 1969, the grand jury of Guilford County, North Carolina, returned a bill of indictment charging the petitioner with murder in the first degree in the death of Pennisi. The bill of indictment is set forth in the Appendix, page 2.

On Monday, May 4, 1970, the case was called for trial before Johnson, Judge Presiding, Guilford County, North Carolina, Superior Court. (Record Case No. 7018SC652, page 6.)

The petitioner moved to suppress the evidence obtained by the State as a result of the searches of June 28, 1969 and July 18, 1969, of petitioner's warehouse, asserting that the searches violated his rights under the Fourth Amendment and under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. His motion was overruled. Petitioner reserved exceptions. (Record Case No. 7018SC652, pages 19 through 36; Record Case No. 7217SC839, pages 8, 9, 10.) (Appendix, pages 3 through 22.)

Upon his subsequent (first) conviction and (first) appeal the petitioner reserved his exception and presented his contentions and the Federal questions to the North Carolina Supreme Court in his Assignment of Error No. 2. (Record Case No. 7018SC652, Page 108.) (Appendix page 49.)

On that first appeal the Supreme Court of North Carolina overruled the defendant's objections and sustained the trial court's ruling that the searches were lawful and the evidence so procured was admissible against the defendant. STATE v. VESTAL, 278 N.C. 561, 180 S. E. 2d 755, Appendix page 52.

Under the law of North Carolina, the indictment against the petitioner for murder in the first degree, carrying a penalty of life imprisonment or death, includes, as lesser included offenses, murder in the second degree, carrying a penalty of two to thirty years imprisonment (North Carolina General Statutes, Article 14, Section 17, Volume 1B, page 316), and manslaughter, carrying a penalty of four months to twenty years imprisonment (North Carolina General Statutes, Article 14, Section 18, Volume 1B, page 330).

In his first trial the petitioner contended that in the event the court permitted the case to go to the jury, the trial court should instruct the jury that among the verdicts the jury could return was a verdict of guilty of manslaughter. The trial court refused so to instruct the jury on the grounds that there was no evidence in the case which could support a conviction of manslaughter, that the petitioner was guilty of murder (in the first or second degree) or nothing. The petitioner objected to the trial court's ruling and failure to instruct the jury that it could return a verdict of manslaughter, reserved an exception (Exception No. 348, Record page 256, Case No. 7018SC652) and brought that exception forward by an assignment

of error on his first appeal. (Record Case No. 7018SC652, page 151; Assignment of Error No. 24.) (See Appendix page 51 for the verbatim assignment of error.)

On appeal, the Supreme Court of North Carolina ruled specifically upon that assignment of error, sustaining the trial court's ruling upon the specific ground that "There being no evidence in the record to sustain a verdict of manslaughter, it was not error for the Court to omit manslaughter from the possible verdicts which the jury might return." See opinion of Justice Lake, Appendix page 52 ; 278 N.C. 561, 180 S.E. 2d 755 at page 779.

Petitioner was granted a new trial on other grounds. 278 N.C. 561, 180 S.E. 2d 755 at page 779. Appendix page 52.

The new trial, because of excessive publicity, was held in Caswell County rather than in Guilford County.

At the new trial petitioner again moved that the evidence procured in the unlawful searches of his warehouse be suppressed. The motions, the proceedings and the rulings were exactly as in his first trial. (Record Case No. 7217SC839, Pages 8-10.) Appendix pages 134-136. He reserved exceptions, and upon his subsequent conviction of manslaughter brought forward his exceptions and the Federal question involved under the Fourth and Fourteenth Amendments to the United States Constitution in his assignments of error. (Assignment of Error No. I, Record pages 219 through 225 and Assignment of Error No. II, Record pages 225 through 228, Record Case No. 7217SC839, Appendix page 173)

In his second trial, notwithstanding the ruling in the first trial and by the North Carolina Supreme Court that the evidence in this case could not sustain a verdict of guilty of manslaughter, the trial court instructed the jury that if it found the petitioner not guilty of murder in the second degree, it should then consider whether the petitioner was guilty of manslaughter, (Record Case No. 7217SC839, Pages 184, 185, 186, 187, 210, 212, 213; Appendix Page 136.) Defendant objected, reserved exceptions and brought forward on appeal from his subsequent conviction of manslaughter the Federal questions involved under the Fifth and Fourteenth Amendments to the United States Constitution under his Assignment of Error No. IX, Record Case No. 7217SC839, page 234. (Record pages 183 through 213, Record Case No. 7217SC839, Appendix page 185.)

The jury found the petitioner not guilty of murder in the second degree. Then, under the trial court's instruction (Record Case No. 7217SC839, Page 212; Appendix Page 136), it considered whether he was guilty of manslaughter and found petitioner guilty of manslaughter.

The Supreme Court of North Carolina affirmed the lower court's rulings as to the unlawful searches of petitioner's warehouse and as to the conviction of manslaughter, and sustained petitioner's conviction and judgment of imprisonment for eighteen to twenty years, thereby overruling the petitioner's contentions under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. (283 N.C. 249, 195 S.E. 2d 297, Appendix page 185.)

In doing so, the North Carolina Supreme Court agreed that the evidence in the two trials was not different in any respect bearing on whether there was any evidence to support a conviction of manslaughter. (See Opinion No. 7217SC839, 283 N. C. 249, 195 S. E. 2d 297; Appendix page 185.)

REASONS FOR GRANTING WRIT

Unlawful Searches and Seizures

Petitioner respectfully submits that the questions he presents are substantial and important, and that as to the unlawful searches and seizures involving his warehouse, the Supreme Court of North Carolina decided a Federal question of substance in a way not in accord with applicable decisions of this court. In support of his contention the petitioner submits the following reasons:

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Evidence obtained by law enforcement

officers in violation of the Fourth Amendment is admissible in criminal prosecutions. (WEEKS v. U. S., 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 [1914]; MAPP v. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 [1961]).

The exclusionary rule is designed to discourage violations of the Fourth Amendment by prohibiting the fruits thereof to be used to secure convictions. (MAPP v. OHIO, supra, and cases therein cited.)

The rule applies regardless of whether the prosecution is Federal (WEEKS v. U.S., supra) or State (MAPP v. OHIO, supra), and regardless of whether the evidence was obtained by Federal officers (REA v. U. S., 350 U.S. 214, 76 S. Ct. 292, 100 L. Ed 2d 233 [1956]) or State officers (ELKINS v. U. S., 364 U.S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 [1960]).

If the officers acted without a warrant, THE STATE MUST ESTABLISH that it was with the knowing, informed consent of the defendant.

In MAPP v. OHIO, supra, the U. S. Supreme Court holds that the exclusionary rule applies to States by reason of the Due Process Clause of the Fourteenth Amendment. In KER v. CALIFORNIA, 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 [1963], the Court held that the standards for determining whether certain police activity violates the Fourth Amendment are the same for both Federal and State officers.

Generally, until recently, law enforcement officers were prohibited from searches and seizures of merely evidence of a crime. (GOULED v. UNITED STATES, 255 U.S. 298,

41 S. Ct. 261, 65 L. Ed. 647 [1921]; U. S. v. LEFKOWITZ, 285 U.S. 452, 52 S. Ct. 20, 70 L. Ed. 877[1932]).

Recently, in WARDEN v. HAYDEN, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 [1967], the U. S. Supreme Court held that the "mere evidence" rule is not a constitutional standard and that evidence of crimes may be seized by police. HOWEVER, the Court cautioned that WHERE THE SEARCH (as in the instant case) IS FOR MERE EVIDENCE THAT FACT IS TO BE CONSIDERED IN DETERMINING WHETHER THE SEARCH IS LAWFUL.

In the words of the Court (387 U.S. at 307):

> "There must, of course, be a nexus--automatically provided in the case of fruits, instrumentalities or contraband--between the item seized and criminal behavior. Thus, in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction."

The concept of probable cause is central to the law of search and seizure. A search warrant may only be lawfully issued upon probable cause. AGUILAR v. TEXAS, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 [1964]. Essentially, "probable cause" means "reasonable grounds". (BRINEGAR v. U. S., 338 U.S. 160, 175-176, 69 S. Ct. 1302, 93 L. Ed. 1879 [1949]). There is probable cause for the issuance of a search warrant ONLY when the facts PROPERLY presented to the issuing

magistrate give him reasonable grounds to believe that seizable property is THEN at the place to be searched (AGUILAR v. TEXAS, supra).

A conclusion stated in an affidavit in support of a search warrant, or seeking a search warrant, that there is probable cause for a search is not constitutionally sufficient. The affidavit must allege the underlying facts from which the conclusion may be reasonably inferred (AGUILAR v. TEXAS, supra). The purpose of this requirement is to permit the issuing magistrate to make an independent determination as to whether there are in fact REASONABLE GROUNDS TO BELIEVE that SEIZABLE PROPERTY IS AT THE PLACE TO BE SEARCHED. (AGUILAR v. TEXAS, supra.)

The probable cause upon which the warrant to search is issued may be based, in whole, or in part, upon information from an informant, that is, hearsay, BUT first there must be a showing that the informant is reliable (JONES v. U. S., 362 U.S. 257, 8 S. Ct. 725, 4 L. Ed. 697 [1960]).

However, "double hearsay" may not be used. The informant's facts must be based on his personal observations (AGUILAR v. TEXAS, supra 378 U.S. at 108, and UNITED STATES v. ROTH, 391 F. 2d 507 [7th Cir. 1967]).

Defendant points out that the affidavit by Police Captain W. H. Jackson as a basis for the search warrant in this instant case violates that rule. In its first paragraph it relates hearsay to the effect that Pennisi disappeared sometime after 7:05 P. M. on June 15, 1969, and was

then last seen by his family. In the next paragraph it relates hearsay as to when and where his body was recovered. In the next paragraph it relates "hearsay" heard by one Jenkins, purportedly from the defendant as to the defendant's having seen Pennisi that day. In the next paragraph it relates hearsay upon hearsay that Mr. and Mrs. Clapp told W. J. Gibson (who possibly told the affiant, Jackson) that they saw Pennisi about 8:00 P. M. that night. In the next paragraph hearsay "findings" by an unknown F. B. I. person are related. No reliability is shown on the part of any informant. Hearsay upon hearsay is used throughout.

The State must show--and did not show in this case--that the informant was reliable, and that reliance on his information was justified. The affidavit must show facts from which the magistrate could conclude that each informant was "credible" and his information "reliable" (AGUILAR v. TEXAS, supra.)

Next, in the affidavit, there is reference to a search on June 28, 1969, of the warehouse with the defendant's "consent". Defendant contends that search was illegal. It has been held that where a detective at a suppression hearing testified that he saw a defendant whom he knew from a prior arrest, and asked the defendant what the defendant had "this time", and the defendant put glassine envelopes with narcotics on the counter, the burden was on the prosecution to show that defendant's consent had been freely and lawfully given (with full knowledge of his right to refuse), and the court erred in placing the burden of proof on the defendant. PEOPLE v. WHITEHURSE, 25 N.Y.2d 389 (New

York Court of Appeals).

On June 28, 1969, in the instant case, the officers (Captain Jackson and Lieutenant Gibson) talked with the defendant at the police station when he was upset about threats to his children and procured his uninformed "consent" to "go and look through his warehouse. . .", actually, for evidence to be used against petitioner, and took three gold drapes which were thereafter used to convict the defendant.

The defendant contended, and contends, that that search of June 28, 1969, was unlawful and not with his knowing and informed consent. This unlawful search is one of the bases for the defective search warrant, and is reason enough, alone, to render the search warrant defective, as well as rendering use of the evidence procured in that first search a serious violation of the defendant's rights.

See also PERKINS v. HENDERSON, 418 F. 2d 441 (5th Cir.) where it is held that consent to a search, conducted without either a warrant or probable cause, was not given voluntarily where officers did not inform defendant that his consent was necessary, and that the search could not and would not be conducted without it.

At the risk of being repetitive, the defendant submits that evidence obtained as a result of a search conducted of Vestal's Flower and Gift Shop Warehouse on July 18, 1969, pursuant to a search warrant obtained on that date is inadmissible. The affidavit made by Captain W. H. Jackson of the Greensboro Police Department failed to state sufficient basis for finding of probable cause that the objects listed in the

affidavit would be found in the warehouse. Evidence found pursuant to an invalid search warrant, not based on probable cause, is inadmissible in state trials. AGUILAR v. TEXAS, 378 U.S. 108, (1964). See N. C. Gen. Stat. Sec. 15-27.

The only affiant and witness examined by the magistrate was Captain Jackson. The affidavit contained only eight paragraphs, of which the only particularly relevant ones were based on hearsay evidence, unsupported by any evidence of reliability or credibility.

Only two pieces of evidence were presented in the affidavit which the State contends show that the scene of the crime was defendant's warehouse. One was the alleged statement by Mr. and Mrs. David Clapp and "others" to Lieutenant Gibson that they saw Mr. Pennisi in the vicinity of Vestal's Flower and Gift Shop at 3:00 P. M. on June 15, 1969. It is improper as a basis for searching the warehouse. Further, it is not lawfully available to support the search warrant, as shown above, because the informants, Mr. and Mrs. Clapp, are in no way shown to be reliable, and because their hearsay was double hearsay passed on by a second informant (Gibson) to Jackson who was the sole affiant relied upon by the magistrate in issuing the search warrant--hearsay upon hearsay, or double hearsay. U. S. v. ROTH, supra. The other evidence consists of a report that drapes "voluntarily" turned over to the affiant by the defendant while the police were at the warehouse on June 28, 1969, three weeks prior to obtaining a warrant to search the warehouse

were "similar" to one found on Pennisi's body. The report of similarity of drapes is hearsay from an unknown person of no asserted reliability. Further, the word "similar" is non-specific, gives no details as to degree of similarity. Both these statements by affiant were defective and could not properly be relied upon by the magistrate to issue a search warrant.

The affiant's statement as to declarations by Mr. and Mrs. David Clapp and "others" to Lieutenant Gibson is hearsay on hearsay. JONES v. UNITED STATES, 362 U.S. 257 (1960) held that an affidavit may be based on hearsay evidence, but it may not be double hearsay. U.S. v. ROTH, supra, and cases therein cited. However, in AGUILAR v. TEXAS, 378 U.S. 108 (1964) the Court held an affidavit inadequate where the police officers swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises. The Court found the application inadequate since it "failed to set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge the validity of the informant's conclusion that the narcotics were where he said they were. Second, the affiant-officers did not attempt to support their claim that their informant was 'credible' or his information 'reliable'." SPINELLI v. U. S., 393 U.S. 410, 413, 414 (1969).

The affidavit states that the defendant invited police to his warehouse and "voluntarily" turned over three drapes. It is fundamental

that neither a search of a person's premises nor a seizure of property from a person may be made unless he knowingly consents. STATE v. MOORE, 240 N.C. 149, 83 S.E. 2d 912 (1954). On the basis of MAPP v. OHIO, 367 U.S. 643 (1961), it is established that by virtue of the Fourteenth Amendment to the Constitution of the United States, the burden of proving knowing consent or waiver of known and explained rights is cast upon the State. Thus burden can be discharged only by clear and convincing evidence that consent was voluntarily and specifically given and was not the result of actual or implied coercion. U. S. v. REINCKE 229 F. Supp. 132 (D.C. Conn. 1964); HUBBARD v. TINSLEY, 336 F. 2d 854 (10th Cir. 1964). The trial court never has found that the petitioner consented to the search of June 28, 1969, with knowledge, or with warning, that he could refuse.

The affiant presented no evidence, beyond his mere conclusionary statement, that the defendant freely consented to the seizure of the drapes. No evidence was presented that the defendant was told at the time of his constitutional right to remain silent, retain an attorney, be free of warrantless searches and seizures, or that any evidence obtained could be used against him in future criminal proceedings. The magistrate had no basis upon the face of the affidavit for determining that the drapes were legally obtained evidence. A search warrant based on illegally obtained evidence is invalid. In the PEOPLE v. FINE, 287 N.Y.S. 2d 440 (N.Y. Sup. Ct., 1968), the Court held

a search warrant invalid which was based upon telephone conversations obtained by an illegal intercept order. A contrary rule would allow the police to validate otherwise illegal, warrantless searches and seizures by obtaining a search warrant upon the basis of the very evidence wrongfully obtained.

The probative value of the F.B.I. report is also in doubt since it was merely hearsay evidence. It does not even reveal that an F.B.I. agent or any reliable or qualified person made any test or report on the drape. The affiant's summary of its conclusions give the magistrate no basis for concluding that the drape around Pennisi's body came from the defendant's warehouse. The drapes were only "similar" in construction, composition, and design, not identical. The size, shape, and particular shade of gold of the drapes were not mentioned in the affidavit.

Further, the search warrant should not have been issued because the affidavit did not provide sufficient basis for a finding of probable cause that the objects sought would be found in the warehouse. The affidavit does not relate the underlying circumstances in order that "'the inferences from the facts which lead to the complaint' will be drawn. . .'by a neutral and detached magistrate' as the Constitution requires,. . .[and not] by a police 'engaged in the often competitive enterprise of ferreting out crime', GIODENELLO v. UNITED STATES, 357 U.S. 480, 487. . .; JOHNSON v. UNITED STATES, 333 U.S. 10, 13. . ." AGUILAR v. TEXAS, 378 U.S. 108, 114. The evidence

obtained as a result of this search warrant should have been excluded from admission in defendant's trial.

Defendant submits that evidence obtained as a result of the search warrant issued on July 18, 1969, should not have been admitted in this trial because the affidavit in support of the warrant does not provide sufficient basis for finding of a probable cause that the objects sought would be in Vestal's warehouse. In addition to the defects in the affidavit discussed above, the search warrant was issued some 33 days following the date of the alleged crime on or about June 15, 1969.

The time lag between the issuance of the search warrant and the date the evidence sought was allegedly present at the warehouse substantially lessens the probability that the evidence will still be there at the date application is made for a search warrant. In his opinion for the Court in SGRO v. UNITED STATES, 287 U.S. 206 at 210 (1932), Chief Justice Hughes stated the controlling principle succinctly:

> ". . .The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment, and this, together with legislation regulating the process, should be liberally constructed in favor of the individual. . . While the statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, IT IS MANIFEST THAT THE PROOF MUST BE OF FACTS SO CLOSELY RELATED TO THE TIME OF THE

ISSUE OF THE WARRANT AS TO JUSTIFY A FINDING OF PROBABLE CAUSE AT THAT TIME." (Emphasis added.)

Courts have upheld this principle by holding search warrants invalid where the facts stated in affidavit were not closely contemporaneous with the application itself. In SIDEN v. UNITED STATES, 9 F. 2d 241 (8th Cir. 1925), the Court condemned a search warrant where the supporting affidavit alleged the presence of incriminating evidence 12 days prior to the application. Time lags of 21 days, UNITED STATES v. NICHOLS, 89 F. Supp. 953 (D.C. Ark. 1950); 42 days, DANDREA v. UNITED STATES, 7 F. 2d 861 (8th Cir. 1925); and four months, DURHAM v. UNITED STATES, 403 F. 2d 190 (9th Cir. 1968) have been held as not supporting a sufficiently close time nexus between the facts in the affidavit and the time of application to warrant a finding of probable case.

In DURHAM v. UNITED STATES, 403 F. 2d 190 at 193, the Court clearly reaffirmed the principles enunciated in SGRO v. UNITED STATES:

> "The most convincing proof that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy. There must be reasonable grounds for believing that the immediate search for which authority is

sought may be fruitful."

In the present case, the evidence in the supporting affidavit could hardly be called "most convincing" since it consisted mainly of hearsay and double hearsay statements of circumstantial evidence. The lack of a close connection in time between the warrant and the date of the alleged crime substantially diminishes what little grounds existed in the affidavit for issuance of the search warrant as the cases cited show.

The motion to suppress should have been allowed.

Conviction of Manslaughter

Petitioner also respectfully submits that the question here raised is substantial and important, and that the Supreme Court of North Carolina decided a Federal question of substance in a way not in accord with applicable decisions of this court for the following reasons:

The decision of the first trial court, sustained on the first appeal by the Supreme Court of North Carolina was "the law of this case" to the effect that the crime in this case was not and could not be manslaughter. Manslaughter was specifically eliminated.

There can be no question that the jury in the second trial was unable to find the defendant guilty of murder in the second degree, and did in fact find the defendant not guilty thereof. Under the Court's instruction, that was their

first assignment--to determine whether the defendant was guilty of murder in the second degree. Then they were instructed, "If you find him NOT GUILTY OF MURDER IN THE SECOND DEGREE, you will then come to the lesser offense of manslaughter. . ." (Exception No. 291, R. pp. 212-213.)

Clearly the jury found the defendant not guilty of murder in the second degree.

At that point the defendant was entitled to a verdict of not guilty, and to his freedom. The jury was not free, under the law of this case, to go forward and convict him of manslaughter.

It is unreasonable to contend that denying him of his liberty at this point was not prejudicial. It is prejudicial to the extent to eighteen to twenty years of his life.

There can be no question that the earlier decision by the North Carolina Supreme Court THAT A CONVICTION OF THE DEFENDANT OF MANSLAUGHTER CANNOT BE SUSTAINED ON THIS RECORD was binding on the trial court in the second trial and constituted the law of this case, and entitled the defendant to a ruling that his conviction of manslaughter be reversed.

MOORE v. HARKINS, 97 S. E. 824, 177 N. C. 113 (1919).

RESORT DEVELOPMENT CO. v. PHILLIPS, 178 S. E. 2d 813, 278 N. C. 69 (1971).

GOWER v. AETNA INSURANCE CO., 185 S. E. 2d 722, 13 N. C. App. 368 (1972).

We respectfully submit that, under the facts and record in this case, the Trial Court's instructions permitting a verdict of guilty of

manslaughter violates the defendant's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States under the doctrines of double jeopardy and of collateral estoppel. See STATE v. BALLARD, 280 N.C. 479, 186 S.E. 2d 372, opinion by Chief Justice Bobbitt, in which he refers to that doctrine as follows:

> ". . . we are advertent to the holding of the Supreme Court of the United States that the principle of collateral estoppel, or res judicata, inheres in the Fifth Amendment's ban against subjecting any person 'to be twice put in jeopardy' ASHE v. STEVENSON, 397 U.S. 436, 90 S.Ct. 1189, 25 L. Ed. 2d 429 (1970)."

In ASHE v. STEVENSON, supra, Justice Stewart, speaking for the United States Supreme Court, points out:

> "The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact we must decide from an examination of the entire record. (Citing cases.)
>
> "'Collateral estoppel' is an awkward

phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in UNITED STATES v. OPPENHEIMER, 242 U.S. 85, 61 L. Ed. 161, 37 S. Ct. 68, 3 ALR 516. As Mr. Justice Holmes put the matter in that case, ' It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt' 242 U.S. at 87, 61 L. Ed. at 164. As a rule of federal law, therefore, it is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of a lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases. . . .

"The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality.

". . .

> "The ultimate question to be determined then, in the light of BENTON v. MARYLAND, supra (395 U.S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056) is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is."

It is significant that the Supreme Court of North Carolina in its opinion ignored the facts and the law. (283 N.C. 249, 195 S.E. 2d 297, Appendix page 185.) We respectfully submit the reason for that is its decision is indefensible under either.

For the convenience of this Court, petitioner submits separately an appendix setting out, in sequence, the most important parts of the record in the two trials and appeals because it is difficult to examine them in sequence as set forth in the two voluminous appeal records.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-52

* * * * * * * * * * * * *

GLOYD A. VESTAL

Petitioner

vs.

STATE OF NORTH CAROLINA,

Respondent

* * * * * * * * * * * * *

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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BILL OF INDICTMENT — MURDER (Filed Oct. 1, 1969)

STATE OF NORTH CAROLINA — In The General Court of Justice, Superior Court Division

COUNTY OF GUILFORD

SEPTEMBER 29th CRIMINAL SESSION, 1969
Under Court Order for Special Session on October 1, 1969 of the Grand Jury

The State of North Carolina
v
Gloyd A. Vestal, Defendant

THE JURORS FOR THE STATE UPON THEIR OATH DO PRESENT, that Gloyd A. Vestal late of the County of Guilford on the 15th day of June 1969, with force and arms, at and in the said county, feloniously, wilfully, premeditatedly and deliberately and of his malice aforethought, did kill and murder Angelo S. Pennisi contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

CHARLES T. KIVETT
Solicitor

WITNESSES:

X Capt. William Jackson—GPD
Lt. J. W. Gibson—GPD
Henry Poole—SBI, Beaman Place, Greensboro, N. C.
X Mrs. Montrose Pennisi, 1601 Wilton Street, Greensboro, N. C.
X Mrs. Shirley Everage, 3920 Phillips Avenue, Greensboro, N. C.

Those marked X sworn by the undersigned fore-

man, and examined before the grand jury, and this bill found X A True Bill.

W. C. WHITE
Foreman Grand Jury

MOTION TO SURPRESS EVIDENCE AND PROCEEDINGS THEREON IN FIRST TRIAL UNDER FOURTH AND FOURTEENTH AMEDNMENTS TO THE UNITED STATES CONSTITUTION

The following proceedings were had in the absence of the jury:

COURT: All right, gentlemen, you all have suggested a motion that you desire to make and at this time in the absence of the jury, I will be glad for you to proceed with it.

You are ready, are you, Mr. Albright?

MR. ALBRIGHT: Yes sir. I believe there is a supplemental memorandum in support of motion to suppress evidence that I have been handed, and I am looking at it at this time.

MR. CAHOON: As we stated to your Honor earlier and in chambers, the defense MOVES TO SUPPRESS certain evidence in the hands of the State, which are the fruits of the search of the defendant's warehouse; the warehouse being described in a certain search warrant, copy of which is attached to the brief we submitted to your Honor. And we do MOVE THAT THAT EVIDENCE BE SUPPRESSED.

Mr. Norman Smith is associated with the defense for the purpose of submitting this argument at this point, and I would like to introduce him.

COURT: For the limited purpose of arguing this motion?

MR. CAHOON: This motion, yes sir.

COURT: Let's see, before you sit down.

MR. CAHOON: I think possibly I should state we do rely on the guarantee against unreasonable search and seizures in the Fourth Amendment, and brought forth in the Fourteenth Amendment, United States Constitution.

COURT: I have seen the search warrant, and I have seen the affidavit upon which the search warrant was issued, I assume. And I have seen the memorandum in support. I have also seen the supplemental memorandum in support. Now, the motion is the thing that is missing. Where is this?

MR. SMITH: The motion is oral, your Honor. If you want us to, we will bring in a written motion.

COURT: I want to know what you are moving to suppress. There has been suggested here that the State has supplied you with a list of how many—ninety or a hundred?

MR. ALBRIGHT: Your Honor, you mean as to witnesses?

COURT: Yes.

MR. SMITH: We just MOVE TO SUPPRESS the things that are attached to the return on the warrant, your Honor. They are on the last page, your Honor, and are the material obtained from the warrant. Those are the items that we move to suppress.

COURT: And you have not prepared a written motion?

MR. SMITH: No sir. We are just presenting it by

argument, an oral motion. It will be a one-line motion. WE MOVE TO SUPPRESS the items listed in the attachment to the search warrant.

COURT: Well, suppose you at this time state for the record exactly what your motion is.

MR. SMITH: Yes sir, your Honor. The defendant is MOVING, if the court please. TO SUPPRESS the items as evidence which are listed in the return on the search warrant dated July 18, 1969.

COURT: To be exact, specify it out.

MR. SMITH: And these items are numbers one through ten on that list which we have just incorporated by reference unless your Honor wants us to read those.

COURT: Read them, please.

MR. SMITH: The first one is: "Stains resembling blood taken from the wall on the north end of the room that is entered from west outside door."

COURT: Now, let's see—it is your position that these things were lifted from the walls and are physically in control of the State?

MR. SMITH: That is right, sir.

COURT: All right.

MR. SMITH: The solicitor agrees with that; that these items are all possessed and controlled by the State and were taken pursuant to the warrant.

MR. ALBRIGHT: Yes sir, everything that is indicated on the search warrant.

COURT: Yes sir, I know, but I want them to go through with them.

MR. SMITH: All right. "Samples of stains resembling blood taken from the ceiling at the north end of the room entered from the west outside door."

COURT: And those stains, likewise, were lifted from the ceiling?

MR. SMITH: Yes sir.

COURT: Go ahead.

MR. SMITH: Number three: "Stains resembling blood on wood that formed a part of the north wall of the room entered by the west outside door."

COURT: Go ahead.

MR. SMITH: Number four: "Stains resembling blood on wood that formed a part of the west wall located at the north end of the room that is entered by the west outside door."

Number five: "Stains removed on a chip of wood, chip being taken from the inside of the door that has previously been referred to as the west outside door. The chip coming from the area of the inside handle."

Number six: "One broom taken from the warehouse area of said building."

Number seven: "One gold colored drapery taken from the room at the north end of the building where furniture and other items are stored."

Number eight: "Hairs taken from the walls at the north end and northwest corner of the room entered by the west outside door."

Number nine: "Automotive lug wrench taken from floor next to the west wall of the building near the inside door leading to the room that is entered by the west outside door."

Number ten: "One piece of leather resembling part of a broken belt taken from the room at north end of the building."

That is the list of the items which we seek to suppress.

COURT: All right.

MR. SMITH: Our motion is based broadly on the Fourth Amendment and the Fourteenth Amendment, United States Constitution, and also General Statutes 15-27.

Our contentions, your Honor, are these: That the warrant, which simply incorporates by reference and affidavit, executed by Captain W. H. Jackson of the Greensboro Police Department, is insufficient on its face and does not make out a case of probable cause allowing the magistrate to issue the search warrant.

Preliminarily—

COURT: Just a minute, Mr. Smith. Would you tell me what this is here? It is not readable.

MR. SMITH: That, I assume, is the return endorsed on the back of it.

COURT: It is not readable to me.

MR. SMITH: I know it, sir. We have been furnished a copy that is identical to your Honor's.

(Conference at the bench between Mr. Smith and the court out of the hearing of the court reporter.)

MR. SMITH: Do you have the original of that?

MR. ALBRIGHT: I have sent for it.

MR. SMITH: I think it is just a return. We are not questioning the correctness of the return.

COURT: All right. Go ahead then if you are not.

MR. SMITH: All right, sir.

Preliminarily, we might say or remind your Honor that whatever was discovered as a result of the search would not retroactively justify it. And if the fruits tend to indicate guilt on the part of anyone or tend to be useful as evidence for the State, this fact is of no use to the State unless the evidence were properly obtained in the first place.

Secondly, the State is bound on what is set out on the face of this affidavit when applied to the warrant. Any other facts that may have been known to the State at that time or were subsequently discovered by the State at other times are not applicable and have no consideration here, because the State is bound by the four corners of this affidavit, and that is what we hope to address our remarks to.

Now, your Honor, what we have before you here is a general, wide-ranging, exploratory search of defendant's warehouse occurring thirty-three days after the alleged crime and occurring some three weeks after the currency of the latest information that came to the knowledge of the State.

We know the warehouse is composed of several rooms as is indicated by the list of evidence attached to the return. We know the warehouse, according to the affidavit, is located some two blocks from the defendant's flower shop.

Now, the only things that in any way that we can see that tend to connect the defendant and his premises to the alleged crime are the following:

One: that the deceased was seen by Mr. and Mrs.

Clapp on June 15, 1969, at eight o'clock in the vicinity of the flower and gift shop, which is two blocks away from the warehouse. Also, we have a statement by the defendant to the effect that at eight o'clock on the same day, the same evening, the deceased was with him at his home. I don't know which of these two things the State is relying upon; whether the State is saying the deceased was in the defendant's home, or that the deceased was near the defendant's flower shop. But in either event, for reasons which we will state in a moment, we don't feel that these items are of any avail or use to the State.

Secondly; there is the fact alleged in the affidavit that certain gold colored drapes were voluntarily turned over to Captain Jackson and given by defendant from his warehouse on June 28, 1969, and that these drapes were sent together with the drapery which was found on the deceased's body to Washington, D. C., F.B.I. Laboratory. I think that these are the only things that in any way tend at all (1) to connect the defendant to the deceased, and (2) to connect the deceased to the warehouse.

And we say for several reasons, your Honor, that these are insufficient. In the first place, the affiant here, and there was only one affiant, was Captain Jackson. And the information from the Clapps which Captain Jackson was relating by way of affidavit to the magistrate was obtained not by him directly from the Clapps but by Lieutenant Gibson and then related to Captain Jackson.

Now, the Supreme Court of the United States in JONES v UNITED STATES says that hearsay is a

proper foundation for a search warrant, and this is later qualified in following decisions. But the Circuit Courts have considered the question of whether hearsay upon hearsay is a proper foundation for a warrant.

And we have a case decided by the Seventh Circuit Court, UNITED STATES v ROTH, decided by the Seventh Circuit Court of Appeals in 1967, which says you can only have hearsay, that you can't build upon hearsay time after time. So we have this problem both with respect to Lieutenant Gibson's relation of the facts said to him to Captain Jackson and in turn Captain Jackson's relation of this to the magistrate.

We also have this problem: In connection with the F.B.I. Report, by an unnamed and unknown F.B.I. person—we don't even know he is a laboratory analyst—to somebody, who in turn told Captain Jackson, who in turn told the magistrate that the drapes were similar.

Also, your Honor, the disparity in time here we think, should be considered by the court in ruling on this motion. That is, the considerable period of time that went by after the alleged homicide and prior to the search. And the authorities on this question are set out in the supplemental memorandum which we filed with your Honor here this afternoon.

The cases say that if you wait too long you cannot make out a case of probable cause because with each day that passes the likelihood diminishes that the materials sought to be found at the identified premises will, in fact, be located there.

The principle here is stated in the case of SGRO v UNITED STATES, and given by Chief Justice Hughes many years ago, wherein the court says: "It is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time," not at some prior time—not at some other time—but at that very moment.

We say, your Honor, that the passage of thirty days, thirty-three days, to be exact, from one time to the other, from one critical time to the second critical time, is entirely too much. We are supported in this assertion by a number of important cases decided by various Circuit Courts of Appeal, among which is an Eighth Circuit case saying twelve days is too much, a District Court in Arkansas saying twenty-one days is too much, and so forth and so on. And the courts say that as time goes by that the convincing power of the evidence loses its force.

And even "The most convincing proof," says one court, DURHAM v UNITED STATES, "that the property was in the possession of the person or upon the premises at some remote time in the past will not justify a present invasion of privacy."

Here, we don't really have the most convincing proof. Here, we have very sketchy evidence. And we say even in the absence of this great difference in the length of time we still would have an invalid search by virtue of the fact that there simply was not probable cause to expect, reasonably expect these things to be where the State said they would be.

We also have the matter of the defendant turning over to Captain Jackson at the premises three drapes. The only thing the affidavit has to say about the mechanics of this turn over or the events surrounding it were that Vestal voluntarily turned them over to Captain Jackson.

Now, as your Honor knows, there was no search warrant at that time so that the only way these drapes could have been procured by the State from the defendant at that time, and prior to the time the warrant was issued, was by a pure and free, completely unburdened, voluntarily search since there was no allegation of arrest and no indication of a warrant. And we think the affidavit here is insufficient in that the essential facts and conclusions necessary to show that Vestal acted voluntarily are entirely missing from the picture here. Because there must be, as all the courts agree, clear and convincing evidence that consent was voluntarily and specifically given and was not the result of actual or implied coercion.

The facts must be set out so your Honor can act upon the voluntariness of Vestal's turn over of these items to the police. And, here, such facts are not disclosed on the face of the affidavit. Hence, we feel this item of proof is not available to the State. Even if it were, the mere fact that some unnamed and unknown person at the F.B.I. Laboratory found that these drapes were similar in construction, composition and design to the drape removed from the deceased's body is unavailable because it is simply suspicion and not something that gives rise to reasonable grounds for belief because there are millions and millions of gold drapes in this country

and for one to be similar to another is purely a coincidental matter.

Now, I assume the F.B.I. Laboratory has the techniques and the ability to make precise analyses to find out the way things are knitted together and the way things are dyed and the threads and other things to develop more than similarity and to develop the opinion that they are precisely identical. This was not done here. If it was done, it wasn't alleged. And since it was not alleged it can't be of benefit to the State.

Even so; even taking all this together, your Honor, and even if all the evidence in the affidavit could be used to the State's benefit, and we say it could not, even so, there is not probable cause here because the State says that you should expect to find fibers, bloodstains, hairs, body fluids, drapes and personal affects of Pennisi at this warehouse.

The mere facts that some gold drapes being taken from the warehouse and somebody saw the deceased two blocks away from the warehouse sometime about the time he is alleged to have disappeared simply doesn't show, doesn't give a reasonable and prudent man the reason to believe and expect, reasonably expect that these items would be found in that warehouse. It raises nothing more than mere suspicion and suggestion, and that is not probable cause. And we submit that your Honor has reason to find the search invalid here.

MR. ALBRIGHT: Is there any other statement that you wish to make?

MR. CAHOON: One other thing: We just want to

reiterate that we do rely on the Fourth Amendment guarantee against unreasonable search and seizures of the Constitution of the United States and it being brought forward, for the benefit of the defendant in this case, by the Fourteenth Amendment, of the Constitution of the United States Due Process Clause.

MR. ALBRIGHT: If your Honor pleases, I would just like to be heard very briefly in rebuttal to the statements and the contentions that have been advanced here this afternoon in support of the suppression of the evidence gained as a result of the execution and service of this search warrant.

Now, as I look at this memorandum of law that Mr. Smith and Mr. Cahoon have submitted to the Court, I see at least two cases which I would like to call to the court's attention. One, of course, is the case of AGUILAR v TEXAS. And the other case is the more recent case of SPINELLI v UNITED STATES. Both of those cases, if your Honor please, involved a proposition wherein the State elects to proceed through relation of information from a confidential informant whose name for various reasons the State would seek to conceal.

Of course, I would submit to your Honor that as to the problems presented by a confidential informant, whose identity for various reasons the State seeks to preserve, that is not the case here at all. What the State has set out in this affidavit are certain facts which the State say and contend establishes probable cause that would justify an issuing magistrate in causing this warrant to issue to the end that the premises in question could be searched.

Now, there are certain principles, however, which were enunciated in the Spinelli case, reiterated, that I would like to remind the court of. And in that case they said this language at the close of the opinion — and when we get down to talking about probable cause, I would like to remind the court of. In the Spinelli case, the court specifically said, "We do not retreat from the established propositions that only the probability and not a prima facie showing of criminal activity is a standard of probable cause." That is one principle which they said they do not retreat from.

And they also reiterate, with commensurate citations of the law, that affidavits of probable cause are tested by much less, much less rigid standards than those governed in the admissibility of evidence at the trial.

They also reiterated that in judging probable cause, the issuing magistrates are not to be confined by negative limitations or by restrictions on the use of their common sense, and that the determination of probable cause should be paid great deference by the reviewing courts.

So there are certain legal propositions that the court reiterates and did not retreat from.

So, as we look at the affidavit in the case before your Honor, it is not a question that the State in the affidavit has got to set out facts that show some prima facie showing of criminal activity. It is not a case where the State has got to make out a prima facia case in its affidavit. It is not a case where you have to adhere. I would suggest to your Honor, to

standards that would govern the admissibility of the evidence at the trial. But there has been language from the Supreme Court that suggests certain, much less rigid standards that apply to probable cause.

But I would submit that there are facts in this affidavit, even though some of it may be hearsay. And I would argue to your Honor that the magistrate can, under the Supreme Court decisions, rely on hearsay in determining probable cause. There are facts in there where a magistrate can judge for himself the question of probable cause. We have, if your Honor pleases, information in this affidavit to the effect that as to the Clapps, as I recall it, that Pennisi, the deceased, was not seen alive—at least, at the time the affidavit was filed—that Angelo Pennisi was not seen alive by any other person after that encounter with the Clapps and others at eight o'clock in the shopping center wherein he was in the vicinity of Vestal's Florist Shop. This is the result of named persons, your Honor, being named in the affidavit who saw this man and recognized him by sight at or about the shopping center about eight o'clock.

Now, the defendant, on the other hand, has made to the police a conflicting statement. He said that at eight o'clock, at the time the Clapps saw the man at Vestal's warehouse — the defendant in the statement to the police says that at eight o'clock the deceased, Pennisi, was with him at his home, which I would argue on the matter of the time there is an obvious conflict. It can't be both ways.

And I would argue to your Honor that this coupled with the fact that no one — no other witness,

at the time, at least — had seen Pennisi alive after that time — that, coupled with the fact that the drape from the body of the deceased when it was brought from the waters of Lake Gaston had been identified as similar in design and composition and construction to a drape that was brought from the bosom of the warehouse, from out of that warehouse — when you weigh these facts together, I would argue to your Honor that there is a sufficient finding there from which a magistrate could conclude there was probable cause to conduct the search.

I would argue to your Honor that the State does not have to make out a prima facie case in its affidavit. They talk about the point that there was time passed between the alleged fatal encounter and the time the search was conducted. But I think common sense and reason tell your Honor in a case of this type that it was sometime after the alleged date of death — that some time had passed before the man's body was discovered. So I don't think the Supreme Court has said that a reviewing court or a magistrate, when it comes to weigh and determine probable cause, has got to suddenly divorce itself from common sense and reason. And I think that the standards by which the court should govern probable cause certainly are less rigid standards than if we were weighing the evidence for its admissibility at the trial.

I would submit that in this affidavit there is enough evidence from which enough facts were there that would justify the magistrate in determining probable cause, and that your Honor ought to pay great deference to the previous determination by the magistrate.

COURT: All right.

MR. SMITH: We might say this, your Honor: The solicitor has mentioned that at the time it was not known that the deceased had been seen later. This is one of the dangers, I think, of trying to get any weight out of the negative information contained in this affidavit here. The affidavit says no known person had seen him later. And from the solicitor's remarks, it is indicated that perhaps other people have.

MR. ALBRIGHT: I was suggesting at the time the affidavit was filed. And that was the only time this was used. Mr. Smith says we are bound by the facts as they appeared at the time. And at that time there had been no other witness that had seen the man at the time the defendant told the police he was at his house. And I argue to your Honor that is a very incriminating, suspicious circumstance.

MR. SMITH: I say to your Honor that that shouldn't be given any weight because the police didn't tell the magistrate how hard they looked and how many people they talked to at that time in trying to find people that had seen him at or about a certain date.

Also, your Honor, I think the Anguilar case and the Spinelli case do require that some factual allegations be stated in the warrant to support the credibility of the Clapps and others, even unnamed, unknown persons. And something must be told to the court through the vehicle of the affidavit to the effect that the Clapps and others —— and the others should be named too. and there is no reason why they can't be named — as to why they are reliable and subject to the court's believing them.

We submit, your Honor, that the information, much of which is inadmissible even for purposes of an affidavit for a search warrant — we concede the standards of admissibility there are less than they are at the trial — but even so, and even considering this evidence, your Honor should not be able to find the magistrate had probable cause to issue this search warrant.

COURT: Anything else by either the State or the defendant?

MR. SMITH: No sir.

MR. ALBRIGHT: No sir.

COURT: We will be in recess for a few minutes while the court studies one or two of these cases.

(A brief afternoon recess is taken at this time.)

COURT: Mr. Smith, I have read your brief, of course, pretty fully. And then I have read some of these cases and, particularly, this Criminal Defense Technique that you handed up to me. And it is pretty thorough. It is about what I would expect of some of the folks who support it But I don't think the experienced trial judiciary would ever subscribe to some of these techniques. If so, there would hardly be any reason to conduct a trial, or there would be rare occasions to conduct a trial. I want to make that clear to you. I place little confidence in anything that is written out in your cases, though I want you to know I have considered them.

But these cases, primarily, have to do with search warrants on affidavits by law enforcement officers for the purpose of establishing a corpus delicti; that a crime was committed.

And then secondary, of course, that that person who happened to be found in the possession of the narcotic or the stolen goods or whatever the case may be was the guilty party.

But now this affidavit reveals to me, and clearly so, and I don't believe you can question this — and I recite this to you because I want to hear what you have to say about it to keep my thinking straight if it is wrong — but this affidavit here certainly establishes without question prima facie, not probable cause, but a prima facie case of a murder. You would concede that, wouldn't you?

MR. SMITH: Yes sir.

COURT: And the only thing that the affidavit was issued by was an attempt, or for was an — excuse me — the only thing the affidavit seemed to attempt to cover upon the basis of a search warrant was to establish who committed the murder.

MR. SMITH: Yes sir.

COURT: There is a vast distinction between these cases you have here and —

MR. SMITH: Who committed the act, and where the evidence was to be found.

COURT: Yes sir.

MR. SMITH: Let me say this, your Honor: It wasn't until two years ago that law enforcement officers were allowed to search for mere evidence. It was only in the last two years that that has been broadened. This search could not have been made at all, I don't think, until quite recently, this going and looking for mere evidence. So I think these same

rules apply, your Honor, in a question of probable cause, not only that a crime had been committed, but that this man did it, and that this location is tied in with it. And we say, your Honor, that the weight and connections are too hazy. It may raise suspicion but not reasonable probable cause.

COURT: You are not saying that until two years ago that a detective in the Detective Division of a Police Department couldn't go out looking for evidence as to who committed a crime?

MR. SMITH: I think such things as just clothing and stains and things like that, mere evidence, were not covered by our statute until two years ago.

COURT: It wasn't until that time — the Federal Courts hadn't gone out on this liberal binge of theirs to make it necessary that that be done in these cases.

MR. SMITH: MAPP v OHIO and HAYDEN v WARDEN abolished the evidence rule and liberalized the rights of the police.

COURT: There hasn't been any liberalization of the rights of police in the last three years that I know of. I don't concede that at all. I have been with it a long time. I have seen it unfold and close too.

MR. SMITH: Your Honor, not only the fact of the commission of the crime, but also the fact of the person against whom the search was directed, and the place which was probably connected with the crime, and probably such evidence as the items would be found there — I just don't see from these little fragments — the Clapps saying this, and the

drapes of similar construction — that you could thereby assume reasonably that all of these items that we recited or any of these items could be found.

COURT: Right here is what the affidavit says; the two first paragraphs seem to be really the basis of the whole thing: That he was last seen alive on June 15, 1969; and that his body was found in Lake Gaston June 21, 1969, fully dressed, head wounds, wrapped in a gold colored drape, and the body bound in chains. There, it was established a crime that some police department had to cope with. And then, thereafter, the affidavit sets forth why the police officer who made this affidavit felt it important to search the premises of the defendant.

YOUR MOTION, as made, IS DENIED.

MR. CAHOON: The defendant reserves an EXCEPTION, if your Honor please.

EXCEPTION NO. 2

COURT: All right. Note the exception.

SEARCH WARRANT, RETURN OF SERVICE ON BACK OF SEARCH WARRANT, AND AFFIDAVIT TO OBTAIN SEARCH WARRANT

SEARCH WARRANT (Filed May 6, 1970)

To the Sheriff or Other Lawful Officer Empowered to Enforce the Criminal Laws —

GREETING:

Whereas information has been furnished me by the affiant named on the attached affidavit (and by the witnesses whose names are listed below), who stated under oath the Gloyd A. Vestal has property

described in the attached affidavit and connected in the manner described in the attached affidavit with the commission of a felony, also described in the attached affidavit. Such property is located as described in the attached affidavit. Whereas I have examined under oath the affiant and such other witnesses as are named below and am satisfied that there is probable cause to believe that the named person has such property on his premises described in the attached affidavit, you are hereby commanded to search the premises for the property in question. If this property is found, seize it and keep it subject to Court order. Herein fail not and of this warrant make due return.

Issued this 18th day of July, 1969, at 2:42 p.m., all of whom are named below:

s/W. D. JACKSON
Affiant

s/A. M. RAY
(Warrant Issuing Official)
Magistrate

RETURN OF SERVICE ON BACK OF SEARCH WARRANT

Search Warrant served on July 1, 1969, 4:15 p.m., Gloyd Albert Vestal, Vestal's Florist, 948 Summit Ave., Greensboro, N. C.

by: Lt. W. J. Gibson
Greensboro Police Dept.

Returned to Magistrate Office 7-19-69 at 12:12 A.M.

by: Capt. Jackson, GPD
G. E. T.

LIST OF ITEMS AND EVIDENCE SEIZED AND TAKEN ATTACHED TO SEARCH WARRANT (Dated July 18, 1969)

Items taken during the execution of search warrant of the premises located at 1214 East Bessemer Ave. property under the control of Gloyd A. Vestal.

1. Stains resembling blood taken from the wall on the north end of the room that is entered from west outside door.
2. Samples of stains resembling blood taken from the ceiling at the north end of the room entered from the west outside door.
3. Stains resembling blood on wood that formed a part of the north wall of the room entered by the west outside door.
4. Stains resembling blood on wood that formed a part of the west wall located at the north end of the room that is entered by the west outside door.
5. Stains removed on a chip of wood, chip being taken from the inside of the door that has previously been referred to as the west outside door. The chip coming from the area of the inside handle.
6. One broom taken from the warehouse area of said building.
7. One gold colored drapery taken from the room at the north end of the building, where furniture and other items are stored.
8. Hairs taken from the walls at the north end and

northwest corner of the room entered by the west outside door.

9. Automotive lug wrench taken from floor next to the west wall of the building near the inside door leading to the room that is entered by the west outside door.

10. One piece of leather resembling part of a broken belt taken from the room at north end of the building.

AFFIDAVIT TO OBTAIN SEARCH WARRANT

Captain W. H. Jackson, Greensboro Police Department, being duly sworn and examined under oath, says under oath that he has reliable information and reasonable cause to believe that Gloyd A. Vestal has on his premises certain property, to-wit: fibers, bloodstains, hairs, body fluids, drapes, personal effects of Angelo S. Pennisi, which constitute evidence of a felony, to wit: murder in the first degree, and blunt instruments which were used in the commission of a felony, to-wit: murder in the first degree. The property described above is located on the premises described as follows: Vestal's Flower and Gift Shop Warehouse, 1214 East Bessemer Avenue, Greensboro, North Carolina, next to G.I. 1200.

The facts which establish reasonable grounds for issuance of a search warrant are as follows:

Angelo Salvatore Pennisi disappeared from Greensboro, North Carolina some time after 7:05 p.m. on June 15, 1969. He was last seen alive by his family at that time.

The body of the said Pennisi was recovered at approximately 7:00 a.m. on June 21, 1969, in Lake Gaston, Mecklenburg County, Virginia, near the North Carolina line, bearing evidence of obvious murder. The fully dressed body had severe head wounds and was draped in a gold colored drape approximately 60" x 79½" in size and was bound around the body by chains.

On June 19, 1969, Gloyd A. Vestal claimed to Detective D. G. Jenkins of the Greensboro Police Department that he had been with the said Pennisi at approximately 8:00 p.m. on June 15, 1969 in Greensboro, North Carolina at 2205 Marston Road, Vestal's home.

On July 16, 1969, Mr. and Mrs. David Clapp and others related to Lieutenant W. J. Gibson, Greensboro Police Department, that they knew Pennisi by sight and recognized him in the immediate vicinity of Vestal's Flower and Gift Shop, Summit Shopping Center, Greensboro, North Carolina at approximately 8:00 p.m. on June 15, 1969.

On June 28, 1969, at approximately 3:15 p.m., after having invited police to accompany him to his warehouse at 1214 East Bessemer Avenue, Greensboro, North Carolina, Gloyd A. Vestal voluntarily turned over to Captain W. H. Jackson of The Greensboro Police Department, three (3) gold colored drapes which were located in said warehouse. These drapes, together with the gold drape which covered Pennisi's body at the time it was found on June 21, 1969, were submitted to the F.B.I. laboratory in Washington, D. C. for examination and the drapes from Vestal's warehouse were found to be

similar in construction, composition, and design to the drape which was wrapped around the body of Pennisi when it was recovered.

Pennisi was not seen alive by any known witness after the Clapps and others saw him on June 15, 1969 at approximately 8:00 p.m.

On July 14, 1969, Gloyd A. Vestal, after being fully warned of his constitutional rights, disclosed to Captain W. H. Jackson that Pennisi had a key to the warehouse at 1214 East Bessemer Avenue and had free access thereto.

The warehouse at 1214 East Bessemer Avenue, Greensboro, North Carolina, is located only two (2) city blocks from Vestal's Flower and Gift Shop in the Summit Shopping Center, Greensboro, North Carolina.

s/W. H. JACKSON
(Affiant)

SWORN to on July 18, 1969.

CHARGE OF COURT TO JURY, FIRST TRIAL, WITH EXCEPTIONS THERETO

CHARGE OF THE COURT

Members of the jury, the State of North Carolina charges in a bill of indictment that Gloyd A. Vestal, who will at times hereafter be referred to by the court as the defendant, late of the County of Guilford, on the 15th day of June, 1969, with force and arms, at and in the said county, feloniously, wilfully, premeditatedly and deliberately, and of his malice aforethought, did kill and murder Angelo S. Pennisi contrary to the form of the statute in such case made

and provided, and against the peace and dignity of the State.

When the defendant was called upon to plead to the charges contained in this bill of indictment, he entered a plea of not guilty. Under his plea of not guilty he denied that he was guilty of any offense charged in the bill of indictment. And he denied each and every portion of the testimony upon which the State relies in this case for a conviction.

Under his plea of not guilty he is presumed to be innocent. This is a shield or guard or protection that the law places about all persons who are charged with violations of the criminal law. And this presumption of innocence remains with this defendant and about him throughout the trial and until the State has satisfied the jury beyond a reasonable doubt of his guilt.

It is the court's duty to instruct you as to the law as it applies in this case, and it is your duty to take the law as it is stated by the court. It is the province of the jury to determine the facts in the case. You listen to the evidence that is offered on behalf of the State and on behalf of the defendant, and you determine what the truth is and what the facts are and take the law as it is stated by the court and apply to the facts as you find them and in that manner arrive at your verdict and allow your verdict insofar as it is humanly possible to speak the truth, which, of course, is the very meaning of the word "verdict" itself, and do this without sympathy or without prejudice toward any person.

(You will be required to return one of the four following verdicts in this case: One, guilty of murder

in the first degree; two, guilty of murder in the first degree with a recommendation that the punishment be life imprisonment; three, guilty of murder in the second degree; four, not guilty.)

EXCEPTION NO. 330

Chapter 14, Section 17 of the General Statutes of this State provides that: A murder which shall be perpetrated by any kind of wilful, deliberate and premeditated killing shall be deemed to be murder in the first degree and shall be punished by death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.
(All other kinds of murder shall be deemed murder in the second degree, and shall be punished in a manner set forth in the statute.)

EXCEPTION NO. 331

The court instructs you, members of the jury, that murder in the first degree is the unlawful killing with premeditation and deliberation and malice of a person by another person.
(The court instructs you that murder in the second degree is the unlawful killing of a human being by another human being with malice.)

EXCEPTION NO. 332

It will be obvious to you that the distinction between murder in the first degree and murder in the second degree is the presence of premeditation and deliberation in murder in the first degree and their absence in murder in the second degree.

At this point the court instructs you that if you find the defendant guilty of murder in the first de-

gree you may accompany your verdict with a recommendation of life imprisonment. If you make no such recommendation, the law provides that the defendant will be put to death in the gas chamber. If you do so recommend, the punishment will be imprisonment for life. You are completely free to accompany your verdict with a recommendation of life imprisonment or not as the law leaves that to your complete and unbridled discretion. The right is with you without restriction, limitation or condition to make such recommendation or to not make such recommendation.

Now, members of the jury, the court instructs you that malice as used in defining murder in the first degree and murder in the second degree may be general or it may be particular.

General malice is wickedness, a disposition to do wrong, a black and diabolical heart that is regardless of social duty and fatally bent on mischief.

Particular malice is grudge or hatred or ill will or spite or desire to be revenged. But malice is also that condition of mind that causes one person to intentionally take the life of another person without justification or excuse.

Premeditation, as used in the court's definition to you of murder in the first degree, means thought beforehand for some period of time, however short.

Deliberation means that the act is done in a cool state of blood. It does not mean reflecting upon it a week or a day or an hour or any other appreciable length of time. But it means an intention to kill, formed and executed in a cool state of blood and

not while under the influence of a suddenly aroused, violent passion.

Before you would convict the defendant of murder in the first degree, it would be essential that the State satisfy you beyond a reasonable doubt that the defendant intentionally committed an act or acts which, in natural and probable sequence, caused the death of the deceased, and that such acts were done with the intention to take his life, and that they were done with premeditation and deliberation and malice. The defendant's act or acts need not have been the only cause of the death. It is sufficient if such act or acts, if any, concurred with some other cause by another or others acting at the same time which in combination with it caused the death of the deceased.

The court further instructs you that before you would convict the defendant of murder in the second degree it would be essential that the State satisfy you beyond a reasonable doubt that the defendant committed an act or acts which, in natural and probable sequence, caused the death of the deceased, and that such act or acts were done with the intention to take the life of the deceased, and that they were done with malice. The defendant's act or acts need not have been the only cause of the death of the deceased. It is sufficient in such act or acts concurred with some other cause by another or others acting at the same time in combination with such act or acts and caused the death of the deceased.

Now, members of the jury, the court instructs you that in this case the State relies upon circum-

stantial evidence.

(Circumstantial evidence is evidence of facts and circumstances which surround and are connected with the particular facts to be proven, and which taken together the court and jury may reasonably consider as proving or tending to prove or negative the ultimate facts sought to be established in the case before them.)

EXCEPTION NO. 333

Circumstantial evidence may be of two kinds, consisting of a number of independent links, each depending upon the others, in which case it is said that each link must be complete in itself, and that the resulting chain cannot be stronger than its weakest link. Or it may consist of a number of independent circumstances, all pointing in the same direction, in which case the individual circumstances, may be compared to the strands of a rope, where no one of them may be sufficient in itself but all together may be strong enough to prove the guilt of a defendant charged with a crime beyond a reasonable doubt or to establish his innocence or to raise in the minds of the jury a reasonable doubt as to his guilt, as the case may be.

Our law says that circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of the truth, and it is essential oftentimes, and when properly understood and applied is highly satisfactory in the matters of the greatest moment. The facts, relations, connections and combinations between the circumstances should be natural, clear and reasonable and satisfactory. When such evidence is relied upon to convict it

should be clear, convincing and conclusive in all its combinations and should exclude all reasonable doubt as to guilt. In passing upon such evidence it is the duty of the jury to consider all the circumstances relied upon to convict and determine where they have been established beyond a reasonable doubt.

If not so established, the circumstance should be excluded from any further consideration and have no weight in reaching a verdict. For example, the State puts up a witness and undertakes to prove a circumstance. You will first determine in your mind: Is this circumstance established beyond a reasonable doubt. If you say that the circumstance has been so established beyond a reasonable doubt, you can take that into consideration in determining what your verdict will be and whether the State has satisfied the jury beyond a reasonable doubt as to the defendant's guilt. If you find that it has not been so established, as the court has told you, it would be excluded from your consideration.

(After considering the evidence in this way and determining the circumstances which are established beyond a reasonable doubt, the next thing for the jury to determine is: Do these circumstances exclude every other reasonable conclusion except that of guilt. If so, the evidence is sufficient to convict; otherwise, it is not. The accepted rule of law is that where the State relies for a conviction upon circumstantial evidence, the facts established or adduced on the hearing must be of such a nature and so related to each other as to point unerringly to the defendant's guilt and exclude every rational hypothesis of innocence.)

EXCEPTION NO. 334

Now, members of the jury, the worthiness of belief of the witnesses in the case is a matter for you to determine. The weight, if any, that you will give to their testimony, you shall determine. In doing this you can take into consideration the reasonableness or the unreasonableness of testimony that a witness gives. You can take into consideration the attitude and manner and demeanor of the witnesses while present here and testifying; the interest or the lack of interest that a witness has in the testimony that a witness gives; the knowledge or lack of knowledge; the opportunity for knowledge or the lack of opportunity for knowledge that the witness has in the matter about which the witness testifies. Or you can take into consideration, members of the jury, any other fact that suggests itself to your good judgment and common sense in determining the worthiness of belief of the witnesses and the weight, if any, that you will give to their testimony.

It is the State's contention that you should convict the defendant of murder in the first degree; that on the morning of June 21st that the body of the deceased was found in Lake Gaston in the State of Virginia by a fisherman; that this body had log chains about it for the purpose of weighting it down; that it likewise had other small chains; that it was wrapped in a drape; that the body was removed from the lake and an autopsy performed where it was found that it had numerous damages to the head area, some of which crushed the skull and which in the opinion of the pathologist any one of which would have rendered the deceased unconscious; that his hands were removed from his body

and sent to the F.B.I. Laboratory and there it was determined by a process of elimination that he was Angelo Pennisi, and the police department of the City of Greensboro were thereupon being notified.

The State contends, members of the jury, that on Sunday, June 15th, that Angelo Pennisi had spent the day with his wife, having attended church and Sunday School, and having had lunch, and having returned to his home and taken a nap, and having spent the evening there with his wife and entertaining another person or others,

(and that he told his wife that he was going away on a business trip that evening with the defendant,)

EXCEPTION NO. 335

leaving his home sometime before or in the neighborhood of five minutes to 7:00 p.m.

It is the State's contention that sometime around eight o'clock that he was seen in the area of the floral shop of the defendant; that the defendant had an Eldorado, 1969, all white Cadillac automobile.

(The State contends the defendant was there in the neighborhood of his floral shop because of a fire there;)

EXCEPTION NO. 336

that the Cadillac was seen there at that time. It is the State's contention that this was an unusual automobile.

(It is the State's contention, members of the jury, that this same automobile was seen sometime around the middle of June of that year in the area of U.S. No. 1 at the Steel Bridge which crosses over Lake Gaston,)

it being the State's contention, members of the jury, (that there had been business relationships between the deceased and the defendant; that these relationships had not been entirely in the open; that there had been certain concealment on the part of the defendant; that the concealment was becoming known and that Pennisi had in mind attempting to unravel the relationship; that he was of the opinion that money had been paid over to the defendant; that he had written a note to the defendant in an effort to apprise him of this, in which he set forth some things that have been offered into evidence in the note.

EXCEPTION NO. 338

It is the State's Contention that the defendant came from Myrtle Beach, where his family was, to Greensboro that same evening. And it is the State's contention, members of the jury, that the defendant has not accounted for all of his time that evening and particularly the time around eight o'clock or from that time on up until the neighborhood of ten o'clock.

(The State contends, members of the jury, that the deceased was murdered in the defendant's warehouse; that although there had been a heavy rain that either that or some mopping had removed many of the bloodstains from the floor; that some remained there, but that there were bloodstains up the walls and on the ceiling and on the door; that within these bloodstains were particles of hair that the State contends were particles of hair similar to those taken from the head of Pennisi; that the hairs

were compared by the crime laboratory of the F.B.I. and in the opinion of an expert in comparison that they were identical hairs.)

EXCEPTION NO. 339

(The State contends, members of the jury, that the bloodstains were those of human blood compared, examined in the laboratory of the F.B.I., and that in the opinion of an expert from the laboratory of the F.B.I. that this was human blood.)

EXCEPTION NO. 340

(It is the State's contention that it has no way of knowing when the body was removed from the warehouse, it being the State's contention that it was there that the body was attacked but that at sometime soon thereafter, either that night or the following night or sometime soon thereafter, that the body was taken and placed in the Cadillac automobile of the defendant, and that it was carried from there to Lake Gaston; that it was wrapped in a drape that the State contends was one that was in the warehouse of the defendant, left there by a lady who had since gone to Alaska; that the hooks and weights from the drape have been compared as being similar to that of the ones that were still there, although of different dimensions, and the State contending that the drapes left there by the lady were of different dimensions,)

EXCEPTION NO. 341

it being the State's contention, members of the jury, that sometime after that, the automobile, that is, the Cadillac automobile trunk was examined by the police department. And it is the State's contention that a hair of the same type as that of Pennisi's was found in that trunk, and that at various places there

were bloodstains found. And it is the States' contention that these bloodstains were human blood and that hair and those bloodstains have likewise been compared by the F.B.I. and compared and so found, and that the bloodstains found to be human blood.

It is the State's contention, members of the jury, that the defendant had a motive for taking the life of the deceased; that he had the opportunity for doing so; that he ,in fact, took the life of the deceased or that he participated in the taking of the life of the deceased. It is the State's contention, members of the jury, that it was done by reason of a plan; that it was done with premeditation and deliberation and malice, and that your verdict should be that of murder in the first degree, it being the State's further contention that if you do not convict the defendant of murder in the first degree then you should convict him of murder in the second degree.

Now, members of the jury, the defendant, on the other hand, contends just to the contrary. He contends that he is innocent, and that the State has not overcome the presumption of innocence that the law placed about him and satisfied you beyond a reasonable doubt that he is guilty; that there should be a reasonable doubt in your mind about his guilt, and that you should give him the benefit of the reasonable doubt and return a verdict of not guilty in the case.

The defendant contends, members of the jury, that he is not guilty;

(that if you are satisfied beyond a reasonable doubt that he had had business associations with the deceased, that these associations were things of the

past; that he owed him no great amount of money; that he owed him no more than $6,000.00 on a Lincoln Continental automobile; that this was the extent of any indebtedness the defendant had to the deceased at this time. And he contends that he is a business man, and that he could have readily paid the $6,000.00 but that there was no pressure about this money; that that didn't enter into the picture at all.)

EXCEPTION NO. 342

He contends, members of the jury, that you should put no weight whatever to any business relationship as between the defendant and the deceased that would prompt him to have any motive whatever to take the life of the deceased;

(that it is true that he was at Myrtle Beach over this weekend; that he had placed a Cadillac automobile in the name of some person down there, and that he was using this Cadillac automobile to come to Greensboro on this particular afternoon.)

EXCEPTION NO. 343

He contends, members of the jury, that he came to Greensboro with his son, leaving his remainder of his family there, and that he went to his home after having stopped and serviced the car and gotten some things for food at the home, and that sometime around seven-thirty that the deceased came to his home, and that they discussed some matters, and that the deceased indicated that he was going somewhere else other than on a business trip; that there had been some discussion between them about going to New York because of the deceased's problems or family's problems, but that

this wasn't agreed upon; that he told him that he had his son there, and he had to remain with his son, or words to that effect, and that he had a discussion with him there, and that when the deceased left that he was supposedly going somewhere for some freak relationship with someone.

It is his contention, members of the jury, that after that time that he didn't leave his home; that he was there with his son until sometime during the evening; that they did go get the dog; that there was some other woman that called him and insisted that he come get her; that in the meantime a person by the name of Simmons came by, and that he and Simmons did leave the house and did go over and get the woman who had called him and carried her over to a motel and left her there.

But he contends, members of the jury, that he knows nothing at all about this murder, if you are satisfied beyond a reasonable doubt that there was a murder committed. He contends, members of the jury, that he had no reason for taking the life of the deceased; that he knows nothing about it; that his presence has been accounted for completely that evening; and that if Pennisi was murdered that it was by someone; that he had no part in the murder whatever, and that it wasn't done with any concurrence on his part.

He contends, members of the jury, that his wife's mother and Simmons and his friend, who wanted him to come over and get her and carry her somewhere; particularly, to the motel, accounts for his whereabouts that evening, and that he understood that when Pennisi left his house that he was going

somewhere other than to go on a business trip, (and that you shouldn't place any reliance on what Pennisi told his wife about it; that you shouldn't place any confidence in any letter that has been offered or found in the car, it being his contention that he can't explain it; that the letter itself explains that there wasn't any indebtedness in the matter between Tom or whoever the Tom was and him and Pennisi, and he contends that there is nothing in this letter that in any way should connect him with this affair, if you are satisfied beyond a reasonable doubt that there was a murder committed.)

EXCEPTION NO. 344

Now, members of the jury, the defendant offered certain witnesses. Our law is emphatic that a perso who is charged with a crime may offer witnesses in his defense or he may refrain from offering witnesses in his defense, as he may elect or as his counsel may advise him.

The court instructs you that there is no burden upon the defendant in this case to satisfy you as to anything. He has a right to rely upon what he contends to be the weaknesses of the State's case. As you have been instructed, the law presumes him to be innocent, and the burden of proof is upon the State to satisfy you beyond a reasonable doubt of his guilt. While the certain State's witnesses were upon the stand, he did elicit from them testimony which he contends militates in his favor. And the court instructs you now that any evidence, whether offered by the defendant or elicited from State's witnesses, that militates in the defendant's favor will be considered by you when you come to make up your verdict.

Now, the defendant didn't go upon the witness stand and testify in his defense. Our law is emphatic that a person who is charged with a violation of the criminal law of this State may go upon the witness stand and testify in his defense or he may remain off the witness stand, as he may elect or as his counsel may advise him to do so. Our law is equally emphatic that his failure to go upon the witness stand shall not be considered in any way by the jury to his prejudice.

Now, members of the jury, the defendant contends that your verdict should be that of not guilty.

The State contends that your verdict should be that of guilty, either of first degree murder or second degree murder.

If the court, in stating the contentions made in this case, has referred to the evidence in a manner different than what you recall it, you are instructed that you will take your recollection of the evidence rather than the court's recollection. The court has not necessarily referred to all of the evidence and that doesn't render any of it unimportant. It is important that when you come to make up your verdict that you take your recollection of the evidence and recall it in its entirety.

The case had been ably argued to you by counsel for the State and counsel for the defendant. It is your duty to take into consideration the arguments and contentions that these gentlemen make and any others that reasonably arise under the evidence, whether they have been referred to by the court or not.

The court instructs you, finally, members of the jury, that if the State has satisfied you beyond a reasonable doubt, the burden being on the State to so satisfy you, that the defendant intentionally committed an act or acts which, in natural and probably sequence, caused the death of the deceased, and that such act or acts were done with the intention to take the life of Pennisi, and done with premeditation and deliberation and malice, and if the State has so satisfied you it would be your duty to convict the defendant of murder in the first degree. As the court has instructed you, such act or acts need not have been this only cause. It is sufficient if such act or acts concurred with some other cause by others or another acting at the same time which in combination with it caused the death of the deceased.

If the State has failed to so satisfy you, it would be your duty to find the defendant not guilty of murder in the first degree.

If you find the defendant guilty of murder in the first degree, at the time of rendering your verdict in open court, you may accompany it with a recommendation that his punishment be life imprisonment. If you make no such recommendation, the law provides that the punishment will be that the defendant be put to death in the gas chamber. If you do so recommend, the punishment will be imprisonment for life. You are completely free to accompany your verdict with a recommendation of life imprisonment or not, as the law leaves that to your complete and unbridled discretion. It is without any restriction, condition or limitation whatever.

If you find the defendant guilty of murder in the first degree then you would not consider whether he is guilty of murder in the second degree. But if you find the defendant not guilty of murder in the first degree, then it would be your duty to consider whether the defendant is guilty of murder in the second degree.

(And the court instructs you that if you come to consider whether the defendant is guilty of murder in the second degree, and the State has satisfied you beyond a reasonable doubt that the defendant committed an act or acts which, in natural and probable sequence, caused the death of the deceased and that such act or acts were done with the intention to take Pennisi's life, and that they were done with malice, it would be your duty to convict the defendant of murder in the second degree.)

EXCEPTION NO. 345

(If the State has failed to so satisfy you, it would be your duty to acquit him of murder in the second degree. The court instructs you that the defendant's act or acts need not have been the only cause of Pennisi's death. It is sufficient if such act or acts concurred with some other cause by others or another acting at the same time in combination with such act or acts that caused the death of the deceased.)

EXCEPTION NO. 346

(The court instructs you, members of the jury finally, that you will be required to return one of the four following verdicts: One, guilty of murder in the first degree; two, guilty of murder in the first

degree with a recommendation that the punishment be life imprisonment; three, guilty of murder in the second degree, or; four, not guilty, depending entirely upon how you, the jury, find the facts under the evidence and the court's instructions to you as the law that applies to this case and to the evidence in this case.)

EXCEPTION NO. 347

You will retire to your room; you will make up your verdict; you will name someone to speak for you; and then you will return your verdict into open court.

At this point the court would like to inquire of the twelve jurors in the box: Do all of you feel well?

JURORS: (No response.)

COURT: Is there anyone who doesn't feel well?

JURORS: (No response.)

COURT: Let the record show that before the jury retired to the room to make up a verdict that the court excused the thirteenth and first alternate juror and the fourteenth and second alternate juror juror and neither of them retired to the room with the original twelve.

Show them to their room, Sheriff.

Let everyone remain in their places.

(The jurors withdraw for deliberation at 11:33 a.m.)

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The defendant excepts to the court's limiting the jury's verdicts to exclude a verdict of manslaughter.

EXCEPTION NO. 348

The defendant excepts to the court's failure to define for the jury the meaning of the term "reasonable doubt."

EXCEPTION NO. 349

(At 12:55 p.m., the court asks the sheriff to bring the jury in. The jurors return to the courtroom.)

COURT: Now, members of the jury, I take it you have not reached a verdict?

MR. F. J. McFAYDEN, JR. (Juror No. 3): That's correct.

COURT: Dismiss the case from your mind during the recess. Do not discuss it during the recess. Remember the cautions that the court has already given you.

Remove the jury from the courtroom.

Everyone remain in their seats.

Have the jury back at two o'clock, Mr. Murphy.

(The jurors withdraw from the courtroom for the noon recess.)

COURT: With everyone standing and remaining in place, recess until two o'clock.

(The noon recess is taken at this time.)

(At 2:00 p.m., the jurors return to the jury box in the courtroom.)

COURT: Let the record show that the court was informed by the bailiff, Mr. Murphy, that the jurors wish to ask the court a question.

Now, members of the jury, is there something

that you wanted to say to the court?

MR. McFAYDEN: Your Honor, the jury requests to be read the bill of indictment.

COURT: All right.
Let's have the bill.

(The file is handed to the court by the deputy clerk, Mrs. Elkins.)

COURT: Now, members of the jury, the bill of indictment reads:

"In the General Court of Justice, Superior Court Division. September 29th Criminal Session, 1969, Under court order for special session on October 1, 1969, of the grand jury. Indictment — Murder.

State of North Carolina, County of Guilford. The State of North Carolina vs. Gloyd A. Vestal, Defendant.

The jurors for the State upon their oath do present, that Gloyd A. Vestal late of the County of Guilford on the 15th day of June, 1969, with force and arms, at and in the said county feloniously, wilfully, premeditatedly and deliberately, and of his malice aforethought, did kill and murder Angelo S. Pennisi contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

And it is signed by Charles T. Kivett as Solicitor. There are names of State's witnesses listed upon that bill of indictment.

MR. McFAYDEN: I think that is sufficient, your Honor. I would like to be read from the State's statute. There is a question concerning the amount

of physical involvement under the law of North Carolina.

COURT: I beg your pardon?

Mr. McFAYDEN: We would like to be read concerning the amount of physical involvement necessary to this charge in the laws of the State of North Carolina.

COURT: The amount of physical involvement concerning what, now?

MR. McFAYDEN: Concerning returning on this bill any charge of murder.

COURT: Are you asking me about the partiular date that is set forth in there?

MR. McFAYDEN: No, sir.

COURT: Which, of course, our courts have said the 15th of June, 1969, which is interpreted as on or about that date, you understand that?

MR. McFAYDEN: Yes sir. We have a question raised of physical involvement.

COURT: I don't know that I understand your question, Mr. Foreman. You are the acting foreman?

MR. McFAYDEN: Yes, sir. What amount of participation is necessary under the laws of the State of North Carolina.

COURT: (Well, let me see. The court has heretofore instructed you and again instructs you that before you would convict the defendant of murder in the first degree, it would be essential that the State satisfy you beyond a reasonable doubt that the defendant intentionally committed an act or acts

which, in natural and probable sequence, caused the death of the deceased; that such act or acts were done with the intention to take the life of the deceased, and with premeditation, deliberation and malice. The defendant's act or acts need not have been the only cause. It is sufficient if such act or acts concurred with some other cause by others or another acting at the same time which in combination with it caused the death of the deceased.)

EXCEPTION NO. 350

And as the court has told you, if the State has failed to so satisfy you, it would be your duty to return a verdict of not guilty.

(If the State has so satisfied you beyond a reasonable doubt, it would be your duty to return a verdict of guilty of murder in the first degree.)

EXCEPTION NO. 351

(Now, the court further instructs you, as it has heretofore instructed you, that before you would convict the defendant of murder in the second degree, it would be essential that the State satisfy you beyond a reasonable doubt that the defendant committed an act or acts which, in natural and probable sequence, caused the death of the deceased, and that such act or acts were done with the intention to take the life of the deceased, and that they were done with malice. The defendant's act or acts need not have been the only cause of the deceased's death, it being sufficient if such act or acts concurred with some other, by some other cause by another or others acting at the same time in combination with such act or acts and caused the death of the deceased.)

EXCEPTION NO. 352

If the State has failed to so satisfy you beyond a reasonable doubt, it would be your duty to acquit the defendant of murder in the second degree.

(If the State has satisfied you beyond a reasonable doubt of such, it would be your duty to convict the defendant of murder in the second degree.)

EXCEPTION NO. 353

Now, the court wants you to clearly understand that if it has not answered your question that it would be glad to hear further from you. If it has answered your question, then I would like for you to indicate so.

MR. McFAYDEN: Thank you, your Honor. I think that satisfies us.

COURT: I take it then that you have no desire for the court to further define to you the terms "premeditation, deliberation and malice," as it has already done so?

MR. McFAYDEN: Not at the present time, your Honor.

ASSIGNMENT OF ERROR NO. 2 AS TO REFUSAL TO SUPPRESS EVIDENCE, FIRST TRIAL

In overruling his motion to suppress evidence found, seized and obtained under and pursuant to a search warrant for the search of the defendant's warehouse, as shown by Exception No. 2 (R p 36) and in admitting in evidence over the defendant's objections, and continuing objection to that line of testimony and evidence, evidence which was seized, discovered, found and obtained pursuant to a search under that search warrant, and as the

fruit thereof, as well as evidence seized, discovered, found and obtained, and which was the fruit of, a search of the same warehouse without any search warrant, as shown by Exceptions Numbered 40 (R p 108), 41 and 42 (R p 109), 43, 44, 45 and 46 (R p 110), 47, 48, 49, 50, 51, 52 (R p 111), 53 and 54 (R p 112), 55 (R p 113), 56, 57 (R p 114), 58, 59 and 60 (R p 115), 61 and 62 (R p 116), 65 (R p 118), 66 (R p 119), 67, 68, 69, 70, 71 and 72 (R p 121), 73 (R pp 121-122), 74, 75 (R p 122), 76, 77, 78, 79, 80 (R p 123), 81, 82, 83, 84, 85 (R p 124) 86, 87, 88, 89 (R p 125), 90 (R pp 125-126), 91, 92 (R p 126), 93, 94, 95, 96 (R p 127), 97, 99 (R p 129), 100, 101, 102 (R p 131), 103, 104 (R p 132), 105 (R p 34), 130, 131, 132, 133, 134, 135, 136 (R p 158), 137, 138, 139, 140, 141, 142, 143 (R p 159), 144, 145, 146, 147, 148, 149, 150, 151, 152 (R p 160), 153, 154, 155, 156, 157, 158, 159 (R p 161), 160 (R pp 161-162), 161, 162, 163, 164 (R p 162), 165, 166, 167, 168, 169, 170, 171 (R p 163), 172, 173, 174. 175 (R p 164), 176 (R p 165), 177 (R pp 165-166), 178, 179 (R p 166), 187, 188, 189 (R p 168), 235 (R p 191), 236, 237, 238, 239, 240, 241 (R p 192), 242, 243 (R p 193), 244, 245 (R p 194), 246, 247, 248, 249, 250 (R p 195), 251, 252, 253, 254 (R p 196), 255, 256 (R p 197), 257, 258, 259, 260, 261 (R p 198), 261(a), 262, 263 (R p 199), 264 (R pp 199-200), 265, 266, 267, 268, 269, 270 (R p 200), 273, 274, 275, 276 (R p 203), 276(a), 277, 278, 279, 280 (R p 204). 281 (R p 205), 289 R pp 206-207), 290, 291 (R p 207).

ASSIGNMENT OF ERROR NO. 24, FIRST TRIAL, AS TO REFUSAL TO CHARGE JURY AS TO A POSSIBLE VERDICT OF MANSLAUGHTER

In erroneously charging the Jury as follows:

"You will be required to return one of the four following verdicts in this case: One, guilty of murder in the first degree; two, guilty of murder in the first degree with a recommendation that the punishment be life imprisonment; three, guilty of murder in the second degree; four, not guilty."

As shown by Exception No. 330 (R p 241).

"The Court instructs you, members of the jury, finally, that you will be required to return one of the four following verdicts: One, guilty of murder in the first degree; two, guilty of murder in the first degree with a recommendation that the punishment be life imprisonment; three, guilty of murder in the second degree, or four, not guilty, depending entirely upon how you, the jury, find the facts under the evidence and the Court's instructions to you as the law that applies to this case and to the evidence in this case."

As shown by Exception No. 347 (R pp 255-256).

and

In limiting the Jury's possible verdicts to exclude a possible verdict of manslaughter, as shown by Exception No. 348 (R p 256).

OPINION AND DECISION, NORTH CAROLINA SUPREME COURT, FIRST APPEAL, 278 N. C. 561,

180 S. E. 2d 755

STATE of North Carolina

v.

Gloyd A. VESTAL

No. 3.

Supreme Court of North Carolina.

May 12, 1971

Defendant was convicted in Superior Court, Guilford County, Walter E. Johnston, Jr., J., of murder in the second degree and he appealed. The Supreme Court, Lake, J., held that admission of documents disclosing business transactions between defendant and homicide victim involving large sums of money and indicating that defendant's motive for murder grew out of the transactions, without evidence identifying purported signature of defendant upon any of the documents, and admission of note written by victim indicating that victim was angry with and suspicious of defendant, which state of mind was not shown to have been communicated to defendant, was prejudicial error.

New trial.

Bobbit, C. J., concurred in result and filed opinion in which Higgins and Sharp, JJ., concurred.

1. Criminal Law — 1144(13)

Contradictions and discrepancies in testimony of State's witnesses are to be resolved by the jury

and, for purposes of defendant's motion for judgment of nonsuit, are deemed by the reviewing court as if resolved in favor of State.

2. Criminal Law — 752½

In determining motion for judgment of nonsuit, incompetent evidence which has been admitted must be considered as if it were competent.

3. Criminal Law — 752½

Test of sufficiency of evidence to withstand motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct or both.

4. Criminal Law — 752½

There is substantial evidence of each element of the offenses charged, or of a lesser offense included therein, and of the identity of the defendant as the perpetrator of it if, but only if, the jury could draw a reasonable inference of each such fact from the evidence.

5. Criminal Law — 752½

If, on motion for judgment of nonsuit, the evidence, together with all reasonable inferences to be drawn therefrom, raises no more than a suspicion or a conjecture, either that the offense charged in the indictment, or a lesser offense included therein, has been committed or that the defendant committed it, the evidence is not sufficient and motion should be allowed.

6. Searches and Seizures — 3.6(1)

A valid search warrant may be issued upon basis of affidavit setting forth information which may not be competent as evidence. G.S. § 15-25 et seq.

7. Searches and Seizues — 3.6(1)

Affidavit for search warrant is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designatd criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender. G.S. § 15-25 et seq.

8. Searches and Seizures — 3.6(3)

Police officer making affidavit for search warrant may do so in reliance upon information reported to him by other officers in the performance of their duties. G.S. § 15-25 et seq.

9. Searches and Seizures — 3.6(1)

Officer making affidavit for search warrant may state in his affidavit reports made to him by competent experts, such as the personnel of the FBI laboratories, concerning their examination of materials forwarded by him to them for such examination and report. G.S. § 15-25 et seq.

10. Searches and Seizures — 3.6(4)

Affidavit disclosing that defendant invited police to accompany him to his warehouse on occasion of first search of warehouse and voluntarily turned over to police draperies similar to the one in which homicide victim's body was wrapped was sufficient to support issuance of warrant for second search of warehouse, as against defendant's contention that affidavit did not show that he acted voluntarily on occasion of first search. G.S. § 15-25 et seq.; U.S. C.A. Const. Amend. 4.

11. Criminal Law — 671

Objection to evidence found in search without

warrant would, in absence of prior consideration of validity of search, necessitate inquiry by court, in absence of jury, to determine validity of search without warrant. G.S. § 15-25 et seq.

12. Searches and Seizures — 7(28)

Whether search without warrant can be justified on ground of consent to search depends on whether consent was given voluntarily and without compulsion. U.S.C.A. Const. Amend. 4.

13. Criminal Law — 394.5(3)

Owner of premises may consent to search thereof and thus waive necessity of valid search warrant so as to render evidence obtained in the search competent. U.S.C.A. Const. Amend. 4.

14. Searches and Seizures — 7(28)

Consent of owner of premises to search must be freely and intelligently given, without coercion, duress or fraud. U.S.C.A. Const. Amend. 4.

15. Searches and Seizures — 7(29)

Burden is upon state to prove that search of premises without warrant was with the valid consent of the owner, the presumption being against waiver of fundamental constitutional rights. U.S.C.A. Const. Amend. 4.

16. Searches and Seizures — 7(27)

Warnings required by Miranda decision in order to make competent a confession made in custody need not be given by officers before obtaining consent of owner of premises to search without warrant. U.S.C.A. Const. Amend. 4.

17. Criminal Law — 394.5(1)

Where defendant at trial objected to introduction

in evidence of fruits of warrantless search of warehouse but made no request for examination of witness on voir dire and gave no intimation of desire to offer evidence that his consent to search was other than voluntary, trial judge was not required to interrupt progress of trial to conduct inquiry into validity of the search. U.S.C.A. Const. Amend. 4.

18. Criminal Law — 338(1)

Questions asked of defense witness who allegedly had talked with homicide victim on alleged night of the killing as to length of time during which witness had been seeing victim and as to their actions on those occasions had no relevancy to matter on trial, the character of victim not being in issue.

19. Criminal Law — 1170(1)

Although questions on direct examination of defense witness as to whether witness had talked by telephone with victim two days after date on which state contended killing occurred were proper since date and hour of victim's death were material factors in state's case, sustaining of objections was not prejudicial since witness on voir dire examination had answered she could not identify caller on date subsequent to alleged time of homicide as the victim and conversation on alleged date of homicide occurred in afternoon and homicide was alleged to have occurred in the evening.

20. Criminal Law — 698(1)

Admission of testimony of homicide victim's wife concerning victim's travel plans was not error as to that portion of testimony to which no objection was interposed.

21. Criminal Law — 698(3)

Benefit of an objection, seasonably made, is lost if thereafter substantially the same evidence is admitted without objection.

22. Criminal Law — 419(1)

Basis for exceptions to rule excluding hearsay evidence is necessity and reasonable probability of truthfulness.

23. Criminal Law — 419(6)

Although death of declarant whose statement is offered into evidence does not, of itself, make statement admissible under hearsay rule, it does, by reason of unavailability of declarant, establish part of the basis of an exception to the hearsay rule.

24. Criminal Law — 415(5)

Testimony by homicide victim's wife that prior to victim's departure on evening he disappeared he stated that he was planning to go on a business trip with defendant was admissible under exception to hearsay rule permitting admission of declarations of decedent to show his intention, when the intention is relevant per se and declaration is not so unreasonably remote in time as to suggest possibility of change of mind.

25. Criminal Law — 419(1)

Exceptions to the hearsay rule should not be transformed into rigid molds precluding all testimony not capable of being squeezed neatly into one of them.

26. Homicide — 169(8)

Testimony of homicide victim's wife that on evening of his disappearance victim told wife he was

going on business trip with defendant, while admissible to show victim's intent to go on business trip with defendant, was not competent to show that defendant intended to set out upon such a trip.

27. Criminal Law — 444

Mere fact that defendant's name appeared on documents indicating that defendant and homicide victim had been engaged in business transactions, and that checks naming defendant as payee were paid by drawee bank did not constitute proof of genuineness of defendant's signatures or proof that any of the documents actually passed through defendant's hands.

28. Criminal Law — 1169(1)

Admission of financial documents disclosing that homicide victim and defendant had been engaged in business transactions involving large sums of money, without evidence identifying purported signature of defendant upon any of the documents, was prejudicial error.

29. Criminal Law — 447

Where financial documents indicating that defendant and homicide victim had been engaged in business transactions were incompetent because of lack of evidence identifying purported signature of defendant upon any of the documents, it was error to permit witness to testify as to contents thereof and as to fact that defendant's name appeared upon checks as payee and as endorser.

30. Homicide — 166(1)

Testimony of State's witness concerning his business transaction with defendant and homicide vic-

tim was relevant to State's contention as to motive for murder.

31. Criminal Law — 438

Admission, over objection, of photographs of homicide victim's body while floating in lake and after it was pulled ashore, still wrapped in chains, for purpose of illustrating testimony of authenticating witnesses, was not error.

32. Criminal Law — 480

Stipulations — 14(7)

Where defendant stipulated that chief medical examiner for the State was an expert "doctor, physician and pathologist and forensic pathologist," opinion testimony as to probable date of death and probable lapse of time between eating and death was properly admitted, and, in any event, doctor's testimony as to his qualifications would have been sufficient to support finding of competence had there been no stipulation.

33. Criminal Law — 486

Expert witness's examination of body of homicide victim was sufficient to serve as basis for his opinion as to date and time of death.

34. Criminal Law — 478(1)

Special agent for the FBI who had received over year of intensive training under qualified examiners of the hairs and fibers unit was properly found to be an expert in the field of analyzing and comparing hairs and fibers.

35. Criminal Law — 1158(4)

Court's finding that a witness is qualified as an expert will not be disturbed on appeal if there is

evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies.

36. Criminal Law — 489

Where state's witness testified that hooks and weights attached to drapery found wrapped around victim's body when it was taken from lake were made by the same machines as hooks on draperies found in defendant's ware house, refusal to permit defendant's counsel to cross-examine witness as to whether he had examined hooks on draperies in his own home to see whether they bore the same characteristics and marks as those upon draperies in question did not unreasonably curtail right of cross-examination.

37. Homicide — 190(7), 338(1)

Hand written note of homicide victim, found in victim's automobile, indicating that victim was angry with and suspicious of defendant with respect to business transaction, was "hearsay" and admission of note could not be justified on theory that it was a threat communicated to defendant in absence of indication that defendant ever saw the note, and admission of note was prejudicial error.

See publication Words and Phrases for other judicial constructions and definitions.

38. Criminal Law — 1169(2)

Permitting witness to testify, over objection, that during conversation with homicide victim on evening before victim's disappearance victim had discussed business relations with the defendant was not prejudicial in view of testimony of police of-

ficers as to interviews with defendant in which defendant related many business transactions with victim.

39. Criminal Law — 1169(3)

In view of police officer's testimony concerning defendant's statements, in presence of defendant's wife, as to defendant's associations with various women, admission of testimony in murder trial, over objection, that witness felt that defendant had "moved back" with his wife "because it would make a better show," although not competent, was not substantially prejudicial to defendant's general character in the eyes of the jury.

40. Witness — 414(2)

Admission of testimony of police officer, over objection, that witness had identified one of defendant's automobiles as a picture of car they had seen in vicinity of defendant's flower shop at approximate time homicide victim was last seen was sufficiently corroborative of testimony of witness to justify its admission.

41. Criminal Law — 824(2)

In absence of request for instruction defining term "reasonable doubt," failure to include definition of the term in the charge was not error.

42. Homicide — 309(3)

Omission of manslaughter from possible verdict which jury might return was not error in absence of evidence in record to sustain verdict of manslaughter.

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The defendant was indicted for the murder of

Angelo S. Pennisi with premeditation and deliberation. He was found guilty of murder in the second degree and sentenced to imprisonment for a term of 25 years in the State's Prison.

The defendant relies upon 29 assignments of error. The pertinent facts relative to those requiring discussion in the determination of his appeal are set forth in the opinion.

Atty. Gen. Robert Morgan, Asst. Atty. Eugene A. Smith, and Staff Atty. Howard P. Satisky, Raleigh, for the State.

Cahoon & Swisher, by Robert S. Cahoon and James L. Swisher, Greensboro, for defendant.

LAKE, Justice.

Denial of Motion for Judgment of Nonsuit

[1, 2] Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. If so, the motion is properly denied. State v. Rowland, 263 N.C. 353, 139 S.E. 2d 661; State v. Virgil, 263 N.C. 73, 138 S.E. 2d 777; State v. Goins and State v. Martin, 261 N.C. 707, 136 S.E. 2d 97. In making this determination, the evidence must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn from it. State v. Goines, 273 N.C. 509, 160 S.E. 2d 469; State v. Cutler, 271 N.C. 379, 156 S.E. 2d 679. Contradictions and discrepancies in the testimony of the State's witnesses are to be

resolved by the jury and, for the purposes of this motion, they are to be deemed by the court as if resolved in favor of the State. State v. Church, 265 N.C. 534, 144 S.E. 2d 624; State v. Simpson, 244 N.C. 325, 93 S.E. 2d 425. In determining such motion, incompetent evidence which has been admitted must be considered as if it were competent. State v. Cutler, supra; State v. Virgil, supra.

[3-5] The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct or both. State v. Cutler, supra; State v. Rowland, supra; State v. Stephens, 244 N.C. 380, 93 S.E. 2d 431. There is substantial evidence of each element of the offense charged, or of a lesser offense included therein, and of the identity of the defendant as the perpetrator of it if, but only if, interpreting the evidence in accordance with the foregoing rule, the jury could draw a reasonable inference of each such fact from the evidence. State v. Rowland, supra. If, on the other hand, the evidence so considered, together with all reasonable inferences to be drawn therefrom, raises no more than a suspicion or a conjecture, either that the offense charged in the indictment, or a lesser offense included therein, has been committed or that the defendant committed it, the evidence is not sufficient and the motion for judgment of nonsuit should be allowed. State v. Cutler, supra; State v. Chavis, 270 N.C. 306, 154 S.E.2d 340. The evidence in the present record, so considered, is sufficient to support though not necessarily to require, findings as follows:

1. On 21 June 1969, the dead body of Angelo Pennisi was found floating in Lake Gaston between the bridges on which Highway 85 and U.S. Highway No. 1 cross the lake, having been submerged in the waters of the lake for a substantial period of time.

2. Wrapped around the body was a length of gold colored window drape and substantial lengths of heavy, metal, log chains, weighing approximately 70 pounds.

3. His pockets were empty except for a folded handkerchief and $32 in bills.

4. On the left side and the back of the head there were several lacerations (i. e., burstings or tearings of the skin as distinguished from cuttings), beneath which there were four or five separate, depressed fractures of the skull. These wounds were caused by blows from an instrument such as a hammer or a length of pipe. There had been four or five such blows upon the head, any one of which would have been sufficient to cause death.

5. The date of death was between four and eight days prior to 21 June.

6. The hour of death was from four to eight hours after Pennisi had a meal consisting in part of kernels of corn.

7. At approximately 1:30 p.m. on 15 June. Pennisi ate a lunch consisting in part of two servings of corn.

8. At 6:55 p.m. on 15 June. he left his home in Greensboro pursuant to his plan to travel by air-

plane that evening to Wilmington, Delaware, on business in the company of the defendant. He was then wearing the clothing found upon the body in the lake.

9. On 15 June, for approximately ten minutes, ending about 7:20 p.m., Pennisi was seen sitting in his automobile parked at the Summit Shopping Center conversing with a man in another car parked in the adjoining parking space. Between 7 p.m. and 7:30 p.m. he telephoned the defendant and at 7:30 p.m. drove to the defendant's home, parking in front of it. The defendant came out, got in the car, and they talked there until Pennisi left shortly before 8 p.m. In that conversation Pennisi was "upset" over the title to a Lincoln automobile and "wanted" $6,000 which the defendant owed him. Immediately prior to 8 a.m. Pennisi was observed walking, in a very determined walk, up to the door of the defendant's flower shop when he stopped abruptly, the flower shop being in the Summit Shopping Center. He was alone. No witness saw him alive thereafter.

10. After the discovery of Pennisi's body in the lake, a belt, similar in size and apparance to the one worn by Pennisi when he left his home on 15 June, broken near the buckle, was found in some tall weeds at a corner of the defendant's warehouse. No belt was found on the body.

11. Inside the warehouse, two blocks from the defendant's flower shop, the investigating officers found, on 26 or 28 June, some gold colored window drapes, which had been left there for storage by a friend of the defendant when she moved to an-

other city. These drapes matched, in color, material, lining, design and stitching the drape found wrapped around Pennisi's body when it was taken from the lake. Among the drapes, so stored by the owner, was one of the size of the drape found wrapped around the body. A drape of that size was not found in the warehouse and none of those stored had been returned to the owner. Those found in the warehouse and the one found upon the body were equipped with the same type of hooks and weights, all the hooks having the same machine markings, indicating that they were all made by the same fabricating machine.

12. On 18 July, the investigating officers also found upon the ceiling and upon the north and west walls of the warehouse numerous spatters of blood, some of these containing hair. The blood was human blood. The several hairs found upon the walls of the warehouse matched, microscopically, hairs taken from Pennisi's body after its removal from the lake. The hairs so taken from the walls of the warehouse were of a Caucasian and, by their condition, showed they had been forcibly removed from the scalp.

13. On 15 June, the defendant owned a Cadillac Eldorado automobile, solid white both interior and exterior. In the trunk of this automobile investigating officers detected on 28 July 1969 a strong odor. From the carpet of the trunk they removed a human hair which, upon expert examination, was found to match, microscopically, the hairs taken from Pennisi's head after the removal of the body from the lake. The investigating officers also found in the

trunk of the white Cadillac a piece of sponge-like material containing a stain and other stains upon the car trunk panel, which panel, made of cardboard, they removed for examination. They also removed from the trunk of the automobile the jack, several sections of the carpet and of the mat under the carpet. Upon expert examination, the piece of sponge-like material, the cardboard panel, the jack, the sections of carpet and the sections of the mat were each found to have human blood upon it.

14. The defendant's white Cadillac automobile was purchased for him, new on 9 June, the purchase being made by a woman friend in her name at his request. The defendant picked it up from her on 12 June. There was then no peculiar odor about it and she was not aware of any blood or hair in or about it. The mechanic of the dealer who sold it to her observed no unusual odor about it and no blood or hair as he serviced it for delivery. He installed the floor mats which he then removed from the trunk of the car. On 13 June, the defendant took it to a State inspector in order to get a State inspection sticker for it. The inspector did not observe any unusual odor then about the car. On that day the manufacturer's warranty for the car was transferred from the name of the woman, to whom it had been issued, to the defendant's name.

15. On 28 June, a friend of the defendant drove the white Cadillac to Mississipi on a trip which lasted nine days. At that time, the car had a strong odor in the trunk. This user of the car had nothing to do with putting any blood or hair in the trunk. On 18 July, the day the blood and hair were found and

removed from the warehouse, the defendant sold the automobile to another friend, who resold it ten days thereafter to a Mr. Shropshire in whose possession the officers found it some two hours later. Shropshire noticed a bad odor about the car, such as cleaning fluid. He had nothing to do with putting any blood or hair in the trunk. He gave the officers permission to take the car into their custody and to search it, including the trunk.

16. On 15 June, the day Pennisi disappeared, another woman friend of the defendant saw the white Cadillac parked in front of the defendant's residence about 7 p.m. When she rode past the house again, as it was getting dark, the Cadillac was gone. At a time after 8 p.m., a solid white, Cadillac Eldorado automobile, with a white vinyl top and white interior, was observed parked in the Summit Shopping Center near the defendant's florist shop. At 7:15 a.m. the next day, a neighbor observed the defendant driving his white Cadillac Eldorado along the street between their houses.

17. The defendant and Pennisi had had numerous business dealings with each other, including construction, purchases and sales of motels. These involved substantial amounts of money. Not all of their transactions had been reported properly for income tax purposes. At the time of his death, Pennisi held past due notes of the defendant's in the amounts of $70,000 and $40,879.37. A financial statement by Pennisi, dated 30 April 1969, showed Pennisi, also held a note of Delaware State Wholesale Florist of Wilmington, Delaware, in the amount of $245,000 due on 15 June 1969, the date Pennisi

disappeared after leaving home for the purpose of going on a business trip with the defendant to Wilmington. (The note would, of course, be due the following day, 15 June being Sunday.) This note was not offered in evidence. Its whereabouts were not shown. Pennisi also held at his death checks for $70,000 and $16,000, respectively, signed by the defendant on 15 January 1968, which checks had not been presented to the bank for payment.

18. The proprietor of Delaware State Wholesale Florist is Thomas Hatzis, called Tom. The defendant used the $70,000 loan made to him by Pennisi to pay off an earlier loan in that amount made to the defendant by Hatzis. Hatzis never had any business dealings with Pennisi except the sale to him of an automobile, for which Hatzis was paid by the defendant. The Delaware State Wholesale Florist (i. e., Hatzis) never owed Pennisi anything and Pennisi never owed Delaware State Wholesale Florist of Hatzis anything. Hatzis knew nothing about the above mention note of $245,000 held by Pennisi and supposedly due on 15 June 1969. Hatzis (i. e. Delaware State Wholesale Florist) never owed Pennisi a penny.

19. On 18 June, prior to the finding of Pennisi's body in the lake, an envelope bearing Pennisi's insurance agency's return address, with the defendant's name typed there on and the word "IMPORTANT" hand printed thereon and also bearing on its face a handwritten notation, "Call me 27 26167 NOW," was found on the front seat of the Ford automobile owned by Pennisi and used by his son. The telephone number so shown was that

of Pennisi's office. The envelope contained a sheet torn from Pennisi's appointment book for 1969. Upon this sheet was printed and written in Pennisi's handwriting and hand printing the following note:

> "I called Tom on June 12 at 11 a.m. He told me you've **already** collected my money. I want it this **morning.** Not tomorrow. I haven't slept all nite. So you better not come out with another lie on your mouth. You better call me right away."

Assuming, as the court must do upon the motion for judgment of nonsuit, that the jury were to find the above facts from the evidence, the jury could reasonably infer therefrom that Pennisi was murdered in the defendant's warehouse on 15 June 1969 at approximately 8 p.m. and that his body was carried from there to Lake Gaston in the trunk of the defendant's Cadillac. It could further reasonably infer that Pennisi, a few minutes earlier, in his conversation with the defendant in front of the defendant's residence, had demanded that the dedefendant go with Pennisi to Wilmington to see Hatzis with reference to Hatzis' denial that he had made the note for $245,000, held by Pennisi and supposed to be due the next day, and was also demanding payment of a large sum of money due Pennisi from Vestal. The jury could reasonably infer from the foregoing facts, if it found them to be established by the evidence, that in this conversation there were bad feelings and charges of bad faith directed by Pennisi to the defendant. It could reasonably infer that they parted to meet immediately at the defendant's warehouse for some further action in relation to these matters and that the defendant there struck and killed Pennisi.

Whether these findings should be made from the evidence and these inferences drawn from such findings was a question for the jury and not for the trial court. Therefore, the motion for judgment of nonsuit was properly denied and this assignment of error is overruled.

Admissibility of Evidence Obtained by Search of Warehouse.

Captain Jackson of the Greensboro Police Department testified that on 26 or 28 June, approximately one week after the discovery of Pennisi's body in Lake Gaston, the defendant came to the Police Office, being fearful for the safety of his children, the cause of this uneasiness being undisclosed in the record. Captain Jackson and Lieutenant Gibson talked with him and the defendant consented for them to look through his warehouse and his flower shop. They did so, the defendant accompanying them. They searched the warehouse in the presence of the defendant. Over objection to testimony as to the fruits of the search, without conducting a voir dire examination, the court permitted Captain Jackson to testify that, in the course of such search, the officers found, stored in the warehouse, three gold drapes used to cover articles of furniture stored there, which they took with the defendant's permission. These drapes were admitted in evidence over objection.

On 18 July, Captain Jackson again searched the warehouse, then having in his possession a search warrant, issued by a magistrate 18 July 1969. In the course of this search the officers discovered an additional drape similar to the ones previously

taken and, upon the ceiling and walls of one corner of one room of the warehouse, numerous spatters of blood, some of which contained hair. These were removed from the warehouse. The drapes, the blood stains and hair were sent to the FBI laboratory in Washington for examination. Expert witnesses, who there made such examination, testified that in their opinion the drapes and linings were similar in composition, construction, design and stitching to the drape found upon Pennisi's body when it was taken from Lake Gaston and that the blood stains were human blood and the hair was human hair, microscopically like hair taken from the head of Pennisi's body after its removal from the lake.

After the selection of the jury, but in its absence and before any evidence was offered, the defendant moved to suppress the evidence so taken from the warehouse pursuant to the search warrant. This motion to suppress did not include the drapes taken on the officers' first visit to the warehouse. The court heard argument of counsel upon this motion but conducted no examination of witnesses with reference to the circumstances of either search, none being offered. It had before it the search warrant and the affidavit of Captain Jackson upon the strength of which the warrant was issued by the magistrate. The defendant's contention at the hearing of the motion was that the affidavit was, upon its face, insufficient to show probable cause for issuing the warrant.

The affidavit of Captain Jackson stated that he had "reliable information and reasonable cause to

believe" that the defendant had "fibers, bloodstains, hairs, body fluids, drapes, personal effects of Angelo S. Pennisi, which constitute evidence of a felony, to-wit: murder in the first degree, and blunt instruments which were used in the commission of a felony, to-wit: murder in the first degree" in his warehouse, the location of which warehouse was specified. The affidavit further stated the following facts (summarized) "which establish reasonable grounds for issuance of a search warrant"; Pennisi disappeared from Greensboro at some time after 7:05 p.m. on 15 June 1969, at which time he was last seen alive by his family; his body was recovered from Lake Gaston on 21 June wrapped in a gold colored drape, bound with chains, with severe head wounds and bearing evidence of obvious murder; prior thereto the defendant had informed Detective Jenkins of the Greensboro Police Department that he had been with Pennisi at approximately 8 p.m. on 15 June at the defendant's home; Pennisi was last seen by any known witness at approximately 8 p.m. in the immediate vicinity of the defendant's flower shop, two blocks from the warehouse proposed to be searched; on 28 June, the defendant invited police to accompany him to the warehouse and there voluntarily turned over to the affiant three gold colored drapes, which were then located in the warehouse; these, together with the drape found upon Pennisi's body, were submitted to the FBI laboratory in Washington and were found to be similar in construction, composition and design to the drape in which Pennisi's body was wrapped when found; after being advised of his constitutional rights, the defendant told the affiant

that Pennisi had a key to the warehouse.

The affidavit is attached to the warrant issued by the magistrate and is referred to therein as being so attached. The warrant states that the magistrate examined the affiant under oath and was "satisfied that there is probable cause to believe that the named person has such property on his premises described in the attached affidavit." The warrant was served and duly returned to the magistrate's office with a list of items taken from the warehouse in the course of the search made pursuant to the warrant.

In the argument of the motion to suppress, counsel for the defendant directed the court's attention to the fact that the affidavit, upon which the search warrant was issued, recited that the defendant voluntarily turned over to Captain Jackson the three gold colored drapes upon Captain Jackson's first visit to the warehouse. Counsel contended that the affidavit was insufficient as to this obtaining of the drapes in that it did not show by clear and convincing evidence that the defendant's "consent was voluntarily and specifically given and was not the result of actual or implied coercion." In this argument defendant's counsel did not deny that the officers' first visit to the warehouse was with the consent of the defendant. No evidence on that point was offered by the defendant either upon the hearing of the motion to suppress or when the drapes were offered in evidence.

Article 4 of Ch. 15 of the General Statutes, which relates to search warrants, was rewritten by Ch. 869, § 8, of the Session Laws of 1969, which became

effective 19 June 1969, approximately one month prior to the issuance of the search warrant in question. As so rewritten, G.S. § 15-25 authorizes any magistrate to issue a warrant to search for "evidence, or instrumentality of crime upon finding probable cause for the search." G.S. § 15-26, as so rewritten provides:

"**Contents of Search Warrant.**—(a) The search warrant must describe with reasonable certainty the person, premises, or other place to be searched and the contraband, instrumentality, or evidence for which the search is to be made.

"(b) An affidavit signed under oath or affirmation by the affiant or affiants and indicating the basis for the finding of probable cause must be a part of or attached to the warrant.

"(c) The warrant must be signed by the issuing official and bear the date and hour of its issuance above his signature."

[6-9] It is not contended that there is any failure of the warrant here in question to comply with the requirements of paragraph (a) and (c) of the statute. The affidavit complies with the requirements of paragraph (b). A valid search warrant may be issued upon the basis of an affidavit setting forth information which may not be competent as evidence. State v. Bullard, 267 N.C. 599, 148 S.E.2d 565, cert. den., 386 U.S. 917, 87 S.Ct. 876, 17 L.Ed.2d 789. The affidavit is sufficient if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that

they will aid in the apprehension or conviction of the offender. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782; State v. Howard, 274 N.C. 186, 162 S.E.2d 495; State v. Bullard, supra. The police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. State v. Banks, 250 N.C. 728, 110 S.E.2d 322. Similarly, he may state in his affidavit reports made to him by competent experts, such as the personnel of the FBI laboratories, concerning their examinations of materials forwarded by him to them for such examination and report. In Binegar v. United States, 338 U.S. 160, 175, 69, S.Ct. 1302, 1310, 93 L.Ed. 1879, the Supreme Court of the United States said: "In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

In Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081, it was established that the Fourth Amendment to the Constitution of the United States forbids the admission in a criminal action, in a state court, of evidence obtained by an unreasonable search and seizure; i. e., a search made without a valid search warrant under circumstances requiring a warrant. That amendment provides that no search warrant shall issue "but upon probable cause, supported by oath or affirmation." As we said in State v. Colson, 274 N.C. 295, 163 S.Ed.2d 376, cert. den., 393 U.S. 1087, 89 S.Ct. 876, 21 L.Ed. 2d 780, this was the law in North Carolina long be-

fore the Mapp decision. G.S. § 15-27(a), as rewritten in 1969, provides: "No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence in any trial."

In Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723, the Supreme Court of the United States dealt with questions concerning the Fourth Amendment requirements for obtaining a valid state search warrant. It said:

"[W]hen a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' * * * and will sustain the judicial determination so long as 'there was substantial basis for [the magistrate] to conclude that [the articles searched for] were probably present.' * * *

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, Jones v. United States, 362 U.S. 257, 80 SCt. 725. 4 L.Ed.2d 697, 78 A.L.R.2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the [articles to be searched for] were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * * was 'credible' or his information 'reliable.' "

Thus, there is no variance between the law of

this State as declared by the decisions of this Court, above cited, and the requirements of the Fourth Amendment as interpreted by the Supreme Court of the United States. The contention of the defendant that the search warrant in the present case was invalid upon its face due to the insufficiency of the affidavit of Captain Jackson is without merit.

[10] At the hearing of the motion to suppress the evidence seized by the search pursuant to the search warrant the defendant offered no evidence nor did his counsel deny, in his argument in support of his motion, Captain Jackson's sworn statement in his affidavit that the draperies, taken by him on his first visit to the warehouse, were "voluntarily turned over to" him by the defendant, the defendant "having invited police to accompany him to his warehouse" on that occasion. The defendant's sole contention in his argument of the motion to suppress the evidence was that the affidavit was insufficient upon its face, that it did not set out any other facts showing that the defendant acted voluntarily on that occasion. Having before it this statement under oath by this police captain, not contradicted or denied, the court properly overruled the motion to suppress the evidence.

When the trial got under way, Captain Jackson was called by the State as its witness. He testified that the defendant, of his own initiative, came to the police headquarters. He talked with Captain Jackson and Lieutenant Gibson "and while there he consented for [them] to go and look through his warehouse." He accompanied them as they searched the warehouse. At that point the defendant in-

terposed his first objection to evidence as to what the officers found in the course of that search without a warrant.

[11, 12] Had there been no prior consideration of the validity of the searches of the warehouse, this objection would have necessitated an inquiry by the court, in the absence of the jury, to determine the validity of the search of the warehouse without a search warrant. Upon such voir dire hearing, the court should receive evidence and make findings of fact. The objection raised a preliminary question of fact for the determination of the trial judge, which it is his duty to resolve. State v. Moore, 240 N.C. 749, 83 S.E.2nd 912. See also State v. Gray, 268 N.C. 69, 150 S.E.2d 1, cert. den., 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed.2d 784. In this respect there is no distinction between the admissibility of a confession and the admissibility of evidence obtained by a search without a warrant. The determining fact in each of these instances is whether the confession or the consent to the search was given voluntarily and without compulsion by the officers.

If the first search without a warrant was a violation of the defendant's constitutional right to be free from an unreasonable search and seizure, the second search was also unlawful because the affidavit upon which the warrant was issued recited and was largely based upon the fruits of the first search. It is the defendant's contention that the search warrant and the evidence produced by the second search, which it purports to authorize, were unlawful and inadmissible because they were fruit of a poisonous tree. Wong Sun v. United States, 371

U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct 182, 64 L.Ed. 319. We, therefore, must consider the validity of the first search of the warehouse.

[13-16] The owner of the premises may consent to a search thereof and thus waive the necessity of a valid search warrant so as to render the evidence obtained in the search competent. State v. Colson, supra; State v. Moore, supra. To have such effect, the consent of the owner must be freely and intelligently given, without coercion, duress or fraud, and the burden is upon the state to prove that it was so, the presumption being against the waiver of fundamental constitutional rights. State v. Little, 270 N.C. 234, 154 S.E.2d 61. However, the warnings required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, in order to make competent a confession made in custody, need not be given by officers before obtaining the consent of the owner to a search of his premises. State v. Craddock, 272 N.C. 160, 158 S.E.2d 25.

When the defendant consented to the first search of his warehouse by Captain Jackson and Lieutenant Gibson, he was not under arrest or otherwise in custody. He was charged with no criminal offense. He, not the officers, sought the interview. There is no suggestion that his concern for the safety of his family stemmed from any action by or fear of the police. At the hearing of his motion to suppress the evidence seized in the second search of the warehouse, the defendant did not move for suppression of the evidence seized in the first search and offered no evidence to contradict the

sworn affidavit of Captain Jackson that it was with his consent and that he voluntarily surrendered to the officers the three drapes then taken. Had there been such evidence he could then have offered it with no prejudice whatever to the presentation of his case. When, at the trial, he objected to the introduction in evidence of the fruits of the first search, he made no requests for the examination of the witness on voir dire and gave no intimation of a desire to offer thereon evidence that his consent was other than voluntary.

[17] While, ordinarily, as above noted, an objection to the admission in evidence of the fruits of a search without a warrant is sufficient to require an inquiry by the court, in the absence of the jury, into the validity of the search, under the circumstances of this case, the law does not require the trial judge to interrupt the progress of the trial for such purpose. As Justice Branch said in State v. McCloud, 276 N.C. 518, 173 S.E.2d 753, "[O]rderly administration of justice demands that this rule [requiring a voir dire examination upon the interposing of an objection] be carefully applied so that planned, piecemeal defenses do not destroy certainty of punishment by causing the criminal courts to deteriorate into an endless series of voir dire hearings and mistrials." We, therefore, hold there was no error in the admission of the drapes obtained in the first search of the warehouse and, consequently, the search warrant, valid upon its face, and the fruits of the search thereunder were not rendered invalid and incompetent by reason of the inclusion in the affidavit, upon which the search warrant was issued, of the statements concerning the finding of

these drapes and their similarity to the one wrapped around the body of Pennisi.

Examination of Annette West

A material element of the State's case is its effort to establish that Pennisi was killed on Sunday, 15 June, shortly after 8 p.m. The State's evidence included testimony by Captain Jackson of a statement made to him by the defendant that the defendant talked to Pennisi between 7:30 and 8 p.m. on 15 June and that Pennisi then told the defendant he had a date with some woman that evening.

The defendant called as his witness Mrs. Annette West. She testified: She had known Pennisi since 1961; she saw him at her place of employment and "would see him after work on dates occasionally"; she saw him on dates on Tuesday and Friday nights of the week prior to 15 June; she talked with him on Sunday, 15 June.

[18] The defendant assigns as error the sustaining of numerous objections by the State to questions propounded to this witness by the defendant. Many of these related to the length of time during which she had been seeing Pennisi and to their actions on those occasions. These objections were properly sustained, the proposed testimony having no relevancy to the matter on trial, the character of Pennisi not being in issue. Evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. State v. Hodgin, 210 N.C. 371, 186 S.E. 495.

[19] Pertinent questions related to the hour of the conversation on Sunday, 15 June, and to whether she talked with Pennisi by telephone on 17 June,

two days after the date on which the State contends he was killed. Nothing else appearing, these questions were proper since the date and hour of Pennisi's death are material factors in the State's case. However, prior to these questions, the defendant was permitted to examine this witness in the absence of the jury upon these matters, and others. She then stated that the conversation on Sunday, 15 June, occurred in the afternoon and related to the making of a date for Pennisi to pick her up at about 8 p. m., but he never came. On this voir dire examination, she also testified that she received a telephone call from a man on Tuesday, 17 June, but she "didn't catch the voice because [Pennisi] don't usually say anything like that" and, consequently, she terminated the telephone conversation. She acknowledged that she had previously told Captain Jackson that she "took" the person making the call on Tuesday to be Pennisi. The caller addressed her "Hi, Kid," Pennisi usually calling her "Kid."

The sustaining of the objections to the questions relating to the conversation on Sunday, 15 June, was not prejudicial to the defendant, since it occurred in the afternoon. On the contrary, had the witness been permitted to testify that Pennisi did not show up for the appointment at 8 p .m., this circumstance would have tended to strengthen the case for the State. The sustaining of the objections to the questions relating to the supposed telephone conversation on 17 June was not prejudicial to the defendant since the record shows the witness would have answered that she could not identify the caller on this date as Pennisi. On the contrary, her testi-

mony would have been that while the caller addressed her as "Kid," the content of the conversation was so different from the customary conversation of Pennisi that she hung up the telephone. Far from being beneficial to the defendant, the jury might well have concluded from this testimony that someone was impersonating Pennisi so as to give the impression that he was still alive. There is no merit in this assignment of error.

Testimony Concerning Pennisi's Travel Plans

Mrs. Pennisi testified, without objection, that Pennisi left their home at 6:55 p. m. on Sunday, 15 June, that he took no suitcase but carried a shaving kit only, that prior to his departure she had some discussion with him in which he referred to a business trip, and that he was planning to go on a business trip to Wilmington, Delaware. Thereafter, over objection, she was permitted to testify that she expected him to return on Monday and that he was going on this trip with the defendant to see about an investment that he had made in that area. Subsequently, without objection, she testified that she became worried when her husband did not return Monday night.

[20, 21)] The defendant assigns the admission of all of this testimony as error. It was not error to admit that portion of it to which no objection was interposed. State v. Perry, 275 N.C. 565, 169 S.E.2d 839; Stansbury, North Carolina Evidence, 2d Ed., § 27. As to testimony that Mrs. Pennisi expected her husband to return on Monday, it is sufficient to note, that, subsequently, she testified, without objection, that she was worried when he did not return Monday

night and on the following day advised her neighbor that he had not returned. It is the rule in this jurisdiction that the benefit of an objection, seasonably made, is lost if thereafter substantially the same evidence is admitted without objection. State v. Williams, 274 N.C. 328, 336, 163 S.E.2d 353; Shelton v. Southern Railroad Co., 193 N.C. 670, 139 S.E. 232; Smith v. Atlantic Coast Line Railroad Co., 163 N.C. 143, 79 S.E. 433; Stansbury, North Carolina Evidence, 2d Ed., § 30.

[22] Having testified that her husband left the house at 6:55 p. m. on Sunday, 15 June, prior to which he had made reference to a business trip, the solicitor asked, "Who did he say he would take this trip with?" Over objection, she replied, "He was going with Mr. Gloyd Vestal." The solicitor then asked, "Where did he indicate that he and Mr. Vestal were going?" Over objection, she was permitted to testify, "That afternoon he said that he was going to Wilmington, Delaware, with Mr. Gloyd Vestal to see about an investment that he had made in that area." Of course, this testimony by Mrs. Pennisi as to her husband's travel plans was hearsay. The twofold basis for exceptions to the rule excluding hearsay evidence is necessity and a reasonable probability of truthfulness. As Professor Morgan has said in 31 Yale Law Journal 229, 231, "If it is to be admitted, it must be because there are some good reasons for not requiring the appearance of the utterer and some circumstance of the utterance which performs the functions of the oath and the cross-examination." See also, Wigmore on Evidence, 3rd Ed., §§ 1420-1423; Stansbury, North Carolina Evidence, 2d Ed., § 144.

[23] The subsequent death of Pennisi does not, of itself, make these statements by him admissible. 29 Am.Jur.2d, Evidence, § 674. It does, however, establish the first basis of an exception to the hearsay rule—necessity; i. e., the unavailability of the declared as a witness. The circumstances under which the statements were made supply the reasonable probability of trustworthiness. It is a matter of everyday experience that a man leaving his home, or his business establishment, for an out-of-town trip will, for domestic and business purposes, inform his family or business associates as to his destination, traveling companion, purpose and anticipated time of return. Such statements customarily have no purpose other than the orderly arrangement of his domestic and business affairs and their proper handling in his absence. It is this circumstance which supplies the required probability of truthfulness.

[24] These statements by Pennisi to his wife as he was preparing to leave the house are relevant to the prosecution of the defendant for his murder, since they, if true, show that Pennisi left the house to join the defendant on a trip to Wilmington, Delaware, concerning a business matter in which they were interested. The State had previously introduced evidence of a statement by the defendant to Police Officer Jenkins prior to the time Pennisi's body was discovered. According to this testimony, the defendant acknowledged that Pennisi had come to his home at approximately 7:30 p. m. on 15 June and had requested the defendant to go with him to New York in connection with some problems involving Pennisi's parents. The testimony of Mrs.

Pennisi, as to the destination and purpose of the trip contemplated by the deceased, was relevant to the questions of motive and of whether the defendant had truthfully narrated the substance of his conversation with Pennisi when talking to the investigating police officer. It would, of course, be for the jury to determine which, if either, was the correct statement as to the destination and purpose of the trip.

In Mutual Life Insurance Company of New York v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706, suit was brought on a policy of life insurance and was defended on the ground that the insured, Hillmon, was not dead but, pursuant to a conspiracy to defraud the insurer, had killed his traveling companion, Walters, and left his body to be found at their camp site. The United States Supreme Court, on appeal from a judgment for the plaintiff-beneficiary, granted a new trial for error in excluding, as evidence, letters written by Walters to his sister and his fiancee, in which he wrote, "I expect to leave Wichita on or about March the 5th with a certain Mr. Hillmon, a sheep trader, for Colorado, or parts unknown to me." The Court said: "[W]henever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party."

In the Hillmon case, supra, the Court quoted with approval from the opinion of Chief Justice Beasley, speaking for the New Jersey Court of Errors and Appeals, in Hunter v. State, 40 N.J.L. 495. In that case, Hunter was indicted for the murder of Arm-

strong. The Court held there was no error in the admission of an oral statement by Armstrong to his son, in Philadelphia on the afternoon preceding the night of his murder, and a letter, written at the same time to his wife, each stating that Armstrong was going with Hunter to Camden on business, Chief Justice Beasley said.

"In the ordinary course of things, it was the usual information that a man about leaving home would communicate, for the convenience of his family, the information of his friends, or the regulation of his business. * * * If it be said that such notice of an intention of leaving home could have been given without introducing in it the name of Mr. Hunter, the obvious answer to the suggestion, I think, is that a reference to the companion who is to accompany the person leaving is as natural a part of the transaction as is any other incident or quality of it. If it is legitimate to show by a man's own declarations that he left his home to be gone a week, or for a certain destination, which seems incontestable, why may it not be proved in the same way that a designated person was to bear him company?"

In State v. Journey, 115 Conn. 344, 161 A. 515, the defendant was on trial for the murder of one Buda, whose wife was permitted, over objection, to testify that when her husband left the house on the morning of the day of his death, he said he was going to to work for Journey. In holding this was not error the Court said:

"A declaration indicating a present intention to do a particular act in the immediate future, made

in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed. It is admissible, not as a part of the **res gestae** but as a fact relevant to a fact in issue."

To the same effect are: People v. Alcalde, 24 Cal. 2d 177, 148 P.2d 627 (murder victim's statement that she was going out with the defendant on the evening of her murder); Smith v. State, 148 Ga. 467, 96 S.E. 1042 (homicide victim's statement to his wife, a short time before leaving home, that he and the defendant were "going over to the hollow to hide a still"); People v. Fritch, 170 Mich. 258, 136 N.W. 493 (statement by victim of murder by abortion of her intent to submit to such operation); Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961 (statement by deceased of her intention to commit suicide held admissible though not part of the **res gestae**).

In an exhaustive annotation in 113 ALR 268, it is said at pages 273, 275 and 288, with numerous supporting citations:

"Evidence of the statements of a person since deceased with reference to the purpose or destination of a trip or journey, no matter how short, that he was about to make, has been admitted as competent in a considerable number of actions, both civil and criminal in character.

* * * * * *

"In 3 Jones on Evidence, § 1220, it is said that the declarations of a person when starting out on a journey, as to the destination or purpose of such journey, have sometimes been held admissible as

characterizing the journey and as part of the **res gestae.** And this theory of **res gestae** is by far the most popular theory of admission, though possibly not as well reasoned as the theory that the declarations are admissible as original evidence, as an exception to the hearsay rule. * * *

"The theory of admission which has the approval of eminent text-writers is that statements made by a person since deceased, with reference to the purpose or destination of a journey or trip that he was about to take, are admissible as original evidence under an exception to the hearsay rule allowing proof of intention or motive."

Treatises and other writings supporting the admission of such statements by deceased persons as an exception to the hearsay rule, independent of the **res gestae** theory, include: Wigmore on Evidence, 3rd Ed. § 1725; McCormick on Evidence, § 270; Wharton on Criminal Evidence, § 289; Stansbury, North Carolina Evidence, 2d Ed. § 162; Professor Morgan's article in 31 Yale Law Journal 229, 233; Barrington, Note, 40 N.C. Law Review 812.

In Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120, and in Little v. Power Brake Co., 255 N.C. 451, 121 S.E.2d 889, this Court held that statements by a deceased person as to the purpose and destination of the trip, upon which he was killed in an automobile accident, were not admissible in evidence in a proceeding under the Workmen's Compensation Act because not part of the **res gestae.**

In the Gassaway case, supra, the statement was made the night before the start of the trip and was

heard by the wife and daughter of the deceased. Justice Barnhill, later Chief Justice, said the statement was not part of the **res gestae** because not connected with the immediate departure. The question in the Gassaway case, however, was whether the declarant was traveling to attend to his company's business as an employee within the protection of the Act or as an executive officer not within the protection of the Act. The statement in question threw no light whatever on that matter. In the Little case, Justice Parker, later Chief Justice, said the statement of the deceased in a telephone call to his wife, approximately half an hour before he left his motel to start on the journey which ended in the fatal accident, was not "so interwoven into his departure that it is vested with the significance of a fact, so as to constitute a part of the **res gestae,**" and was properly excluded. However, as shown in the opinio.., the statement in question did not disclose where the customer, on whom the declarant intended to call, resided, and there was other evidence to indicate that he may already have been visited before the accident and that, at the time he was killed, the deceased was driving further to visit relatives.

In Coley v. Phillips, 224 N.C. 618, 31 S.E. 2d 757, this Court said:

> "For a declaration to be competent as part of the **res gestae,** at least three qualifying conditions must concur: (a) The declaration must be of such **spontaneous** character as to be a sufficient safeguard of its trustworthiness; that is, preclude the likelihood of reflection and fabrica-

tion; * * * (b) it must be **contemporaneous** with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom * * *; and (c) must have some **relevancy** to the fact sought to be proved.

* * * * * *

"No rule of universal application can be devised as to the time element; but the principle of relevancy to the fact sought to be proved by it admits of no relaxation." (Emphasis added.)

More specifically with reference to statements as to travel plans, it is said in an annotation in 163 A.L.R. 15, at page 21:

"A class of declarations which are often remote from the accident, yet so linked with it in continuity of action and proof as to be termed a part of the **res gestae,** are those which fall under the principle that if one, **when about to depart on a journey,** declares his intention as to his course of travel, his purpose, or his destination, the declaration is admissible as evidence that he followed that intention or purpose. Strictly speaking, the statement may be said to be part of the **res gestae of the departure,** but it is usually spoken of as part of the res gestae of the accident in general. * * *

"Under this general principle, the declaration, to be admissible, must have been made **at the time of departure** or **in preparation therefor."** (Emphasis added.)

In the present case, the statement by Pennisi was part of his preparation for departure. The nature

of the statement supplies the probability of truth, which is the only function of the element of spontaniety mentioned in Coley v. Phillips, supra. We see no plausible basis for holding such a statement admissible if shouted back to the wife as the car leaves the driveway, but inadmissible if told to her at the dinner table or while packing the traveler's suitcase. The sound basis for its admission is not the **res gestae** doctrine, but the exception to the hearsay rule permitting the admission of declarations of a decedent to show his intention, when the intention is relevant per se and the declaration is not so unreasonably remote in time as to suggest the possibility of a change of mind.

In State v. Dula, 61 N.C. 211, the appeal was from a conviction of murder. The body of the deceased was found, several weeks after her disappearance, near "the Bates place." A witness was permitted to testify that, as the deceased rode by on the day she disappeard, she told the witness "she was on her way to the Bates place; that the prisoner had returned just before day, was going another way and she expected to meet him at the Bates place." Chief Justice Pearson said: "The conversation between Mrs. Scott and the deceased ought not to have been admitted as evidence. At all events, no part of it except that the deceased said she was going to the Bates place." The reason given was that her statement as to where the defendant was and that she expected to meet him could not be considered a part of the acts of the deceased;" i. e., not a part of her act of riding along the road. On retrial, the statement, as to the destination of the deceased only, was admitted but, thereafter, the State withdrew it and the jury was instructed to dis-

regard it. On the second appeal, 61 N.C. 440, it was said, "The evidence was admitted as part of the act;" i. e., the act of the deceased in riding along the road.

The Dula case is distinguishable from the one now before us. **First,** the declaration of the deceased in that case as to the time of Dula's return and as to the route by which Dula was traveling to the Bates place has no counterpart in the statement by Pennisi in the case before us. **Second,** as to the declaration that the deceased expected to meet Dula at the Bates place—the portion of the statement relevant to the matter before us—the statement was made to an acquaintance casually passed en route. There was no showing of any reason for making it which would supply a reasonable probability of truthfulness. The statement by Pennisi, on the contrary, was made to the witness, his wife, under circumstances, which in and of themselves, supply a reasonable probability of truth.

It is the normal, natural, customary routine for a man leaving his home, or office, upon an out-of-town trip to inform some member of his family, or an employee or business associate, of where he is going, with whom and when he will return. Of course the particular declarant on the particular occasion may falsely state these matters to his wife or to his business associate. The credibility of his statement on the particular occasion is always open to question, but that is a question for the jury. The fact that in the overwhelming preponderance of such instances the statement is true, because it has no purpose or significance except to promote the or-

derly conduct of the declarant's domestic or business affairs, supplies that reasonable probability of truth in the particular instance which justifies the court in permitting the jury to hear the statement and determine its truth or falsity.

The Dula decision was handed down by this Court more than a century ago. None of the authorities cited above was then in existence. The only exception to the hearsay rule discussed by our distinguished predecessors in their consideration of the Dula case was **res gestae.** We do not now reject the precedent of Dula insofar as the **res gestae** exception is concerned. We hold the testimony as to the statement by Pennisi, now under discussion, admissible under an exception to the heresay rule developed and accepted, by other courts and by the eminent scholars in the field of Evidence cited above, since the Dula case was decided.

[25] No branch of the law should be less firmly bound to a past century than the rules of Evidence. the purpose of the rules of Evidence is to assist the jury to arrive at the truth. Exceptions to the heresay rule, evolved by the experience and wisdom of our predecessors for that purpose, should not be transformed by us into rigid molds precluding all testimony not capable of being squeezed neatly into one of them. The Dula case can no longer be deemed authoritative in the factual situation before us.

[26] The admissibility of Mrs. Pennisi's testimony as to her husband's statement concerning **his** travel plans is not predicated upon Vestal's contrary statement to the investigating police officer, though it is relevant to that matter also. Her testimony

would have been admissible had Vestal made no statement whatever. Pennisi's statement, so recounted by her, was admissible to show that Pennisi had the intent to go to Wilmington to see about an investment he had made in that area, that **Pennisi** had the intent to go on that trip with Vestal, that **Pennisi** left home on that mission. It is competent evidence indicating that for such purpose Pennisi reached and entered into the company of Vestal on the night the State's evidence tends to show he was killed in Vestal's warehouse. It does not show, presumably was not offered to show and certainly would not be competent to show, that **Vestal** intended to go to Wilmington or set out upon such a trip.

It is immaterial that Pennisi never reached Wilmington. In this case his arrival there is not the fact at issue. What is at issue is his association with Vestal that evening in Greensboro. The statement is relevant upon that matter and the circumstances under which it was made clothe it with a sufficient probability of truthfulness to permit the jury to hear it and to determine its truth or falsity. Consequently, there was no error in permitting Mrs. Pennisi to testify as to Pennisi's travel plans.

Consequently, there was no error in permitting Mrs. Pennisi to testify as to her husband's statement concerning his plan to travel with the defendant to Wilmington, Delaware, to see about an investment.

Admission of Financial Documents and Testimony Relating Thereto

Over objection in each instance, the State was permitted to introduce in evidence the following exhibits:

No. 23, purporting to be a note made by the defendant to Pennisi for $70,000, due 15 January 1968;

No. 24, a "Financing Statement," purporting to be signed by the defendant to secure an undesignated obligation from him to Pennisi;

No. 25, a chattel mortgage, purporting to be given by the defendant to Pennisi to secure Exhibit 23;

No. 26, a document purporting to be signed by the defendant and to be an assignment by him to Pennisi of his rights under a contract with S. S. Kresge Company for the security of Exhibit 23;

No. 27, a note for $40,879.37, payable to Pennisi, dated 12 August 1968, due "October 1968," purporting to be signed by the defendant;

No. 28, a check signed by Pennisi, payable to the defendant, in the amount of $70,000, stating it is "for LOAN, due and payable Jan. 15, 1968" (see Exhibit 23) bearing the bank stamp "PAID" and purporting to be endorsed by the defendant and by T. Hatzis;

No. 29, a check signed by Pennisi, dated 22 January 1968, payable to the defendant, in the sum of $15,000, bearing the bank stamp "PAID" and purporting to be endorsed by the defendant;

No. 30, a check signed by Pennisi, dated 16 July 1968, payable to the defendant, in the amount of $50,000, bearing the bank stamp "PAID" and purporting to be endorsed by the defendant.

Attorney Julius Dees, Jr., testified for the State that he represented Pennisi and, at his request, drafted Exhibits 23 through 26 and, after Pennisi's

disappearance, recorded No. 24 and No. 25 at the request of Mrs. Pennisi. He testified that they were not executed in his presence. Mr. Walter Faison, trust officer of North Carolina National Bank, which bank is coexecutor of the Pennisi estate, testified that all of these exhibits, 23 through 30, were in the possession of the bank as such executor. After the exhibits were admitted in evidence, Mrs. Pennisi testified that Nos. 28, 29 and 30 were signed by Pennisi. No witness testified as to the genuineness of any purported signature of the defendant on any of these exhibits.

Police Officer Jenkins testified to an interview which he had with the defendant between Pennisi's disappearance and the discovery of his body. He testified that in this interview the defendant told him of various transactions in which he and Pennisi had participated, that he had "borrowed $50,000 at a time from Mr. Pennisi, but that at the present he was settled up with Mr. Pennisi except for" $6,000 which he owed Pennisi for a Lincoln Continental automobile. Officer Jenkins further testified that in this interview the defendant told him of his conversation with Pennisi between 7:30 p.m. and 8 p.m. on Sunday, 15 June, the date of Pennisi's disappearance, and that "Mr. Pennisi was upset over the title of a Lincoln automobile, and that he wanted $6,000 that Vestal owed him," and he would pay Pennisi "even if he had to borrow the money from Mr. Tom Hatzis of Wilmington, Delaware," a mutual friend of the defendant and Pennisi.

[27, 28] These several documents were relevant to the State's contention that Pennisi and the de-

fendant had been engaged in business transactions involving large sums of money and that the motive for Pennisi's murder grew out of those transactions. There is, however, no evidence in the record identifying the purported signature of the defendant upon any of these documents. The mere fact that his name appears on each document and the fact that the checks naming him as payee were paid by the drawee bank do not constitute proof of the genuineness of his several signatures or proof that any of these documents actually passed through the defendant's hands. In the absence of such identification of these exhibits as having been signed or possessed by the defendant, their admission in evidence was error. State v. Breece, 206 N.C. 92, 173 S.E. 9; Strong, N.C. Index 2d, Criminal Law, § 80. Their admission in evidence was substantially prejudicial to the defendant. The fact that Pennisi's signatures upon Exhibits 28, 29 and 30 were not properly identified until after the exhibits were introduced in evidence would not have made their admission reversible error. State v. Franks, 262 N.C. 94, 136 S.E.2d 623.

[29] The documents being incompetent, it was error to permit the witness Faison to testify as to the contents thereof and as to the fact that the defendant's name (not his genuine signature) appeared upon the checks as payee and as endorser.

[30] There was no error in the admission of the testimony of the witness Hatzis concerning his own business transactions with the defendant and Pennisi, this evidence being relevant to the State's contention as to the motive for the murder. The State

had introduced, without objection, two financial statements given by Pennisi, each of which purported to show Pennisi held a note made by Delaware State Wholesale Florist (Hatzis' trade name) of Wilmington, Delaware, due 15 June 1969 (actually due the following day, 15 June being Sunday). This is the date on which the State contends Pennisi left his home with intent to go with the defendant to Wilmington, Delaware, to see about an investment. It was not error to permit Hatzis to testify that he did not owe Pennisi any sum whatever. This evidence was relevant to the State's contention that there was a controversy about the existence of the alleged indebtedness, and the purpose of Pennisi's trip to Wilmington in the company of the defendant was with reference to this controversy. Such evidence was clearly relevant to the question of motive for Pennisi's murder. Furthermore, the defendant recalled Hatzis as his own witness and, as such, had him testify that there was never any money due from Hatzis to either Pennisi or the defendant. Had there been any error in the testimony to this effect by Hatzis, when under interrogation by the State, the defendant lost the benefit of such error through introducing evidence to the same effect. State v. Williams, 274 N.C. 328, 163 S.E.2d 353; Stansbury, North Carolina Evidence, 2d Ed., § 30.

Admission of Photographs in Evidence

[31] Over objection, the State introduced in evidence five photographs of Pennisi's body while floating in Lake Gaston and immediately after it was pulled ashore, still wrapped in chains and in the gold drape. The defendant contends that these are inflammatory and were needlessly placed in evi-

dence, since the defendant had offered to stipulate that the body was that of Pennisi and that the cause of his death was head injuries as contended by the State. The photographs were properly authenticated and were introduced for the sole purpose of illustrating the testimony of the authenticating witnesses. There was no error in admitting them for this purpose. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241; State v. Porth, 269 N.C. 329, 153 S.E.2d 10. These exhibits were not excessive in number.

Admission of Expert Opinion Testimony

[32, 33] The State introduced the testimony of Dr. Chapman, Assistant Chief Medical Examiner for the State of Virginia, who performed an autopsy on the body of Pennisi and who, over objection, testified as to his opinion concerning the probable date of death and the probable lapse of time between the eating by the deceased of corn, found in his stomach, and the death. There is no merit in the defendant's objection to the opinion testimony of this witness. The record shows that the defendant stipulated that he was an expert "doctor, physician and pathologist and forensic pathologist." The doctor's testimony as to his qualifications would have been sufficient to support such finding had there been no stipulation. His examination of the body of Pennisi was sufficient to serve as a basis for his opinion as to the date and time of death. State v. Bright, 237 N.C. 475, 75 S.E.2d 407.

[34] The State also called as its witness Frederick J. Wallace, who testified that he has been a Special Agent for the Federal Bureau of Investigation since October, 1963, and, as such, conducts

microscopic examinations and comparisons of hairs and fibers at the FBI Laboratory, that he has conducted thousands upon thousands of such examinations, has testified as an expert in this field numerous times and that he received over a year of intensive training in the FBI Laboratory, under qualified examiners of the Hairs and Fibers Unit, until such time as it was recognized that he was competent to conduct examinations on his own. The court found Mr. Wallace to be an expert in the field of analyzing and comparing hairs and fibers. The defendant assigns this finding as error. There is no merit in this contention.

[35] The court's finding that a witness is qualified as an expert will not be disturbed on appeal if there is evidence to show that, through study or experience, or both, he has acquired such skill that he is better qualified than the jury to form an opinion on the particular subject as to which he testifies. Paris v. Carolina Portable, Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131; State v. Moore, 245 N.C. 158, 95 S.E.2d 548; Stansbury, North Carolina Evidence, 2d Ed. § 133. There is in this record substantially more evidence of the expertness of Mr. Wallace than was present in the case of State v. Mobley, 273 N.C. 471, 160 S.E.2d 334, cited by the defendant. Consequently, there was no error in permitting this witness to testify as to his findings and opinions concerning the similarity of the drapes found in the defendant's warehouse with that found upon the body of Pennisi, or as to the similarity of the hairs found in the warehouse and in the trunk of the defendant's automobile with hairs taken from the head of Pennisi's body.

[36] The State also called as its witness Frank DeRonja, a Special Agent for the Federal Bureau of Investigation, assigned to the Physics and Chemistry Section of the FBI Laboratory, his duties being the making of examinations of metals and metal products. He was found to be an expert in metallurgy and as to this finding the defendant interposed no objection. Mr. DeRonja testified that he examined the hooks and weights, found attached to or in the drape wrapped around Pennisi's body when it was taken from the lake, and the hooks and weights, attached to or found in the drapes taken from the defendant's warehouse. He testified that machine markings on these showed the hooks on all of the drapes were made by the same machines and that the weights on all of them were of the same size, type and construction. Upon cross examination, he acknowledged that he has drapery hooks in his own home. The court sustained objections to questions by defendant's counsel as to whether he had examined the hooks on the draperies in his own home to see whether they bore the same characteristics and marks as those upon the drapes here in question. The defendant assigns this as error, contending that the court thereby unreasonably curtailed his right of cross examination. There is no merit in this assignment.

Admission in Evidence of Note from Pennisi Found in Automobile

Over objection, the State was permitted to introduce in evidence a note found between Pennisi's disappearance and the discovery of his body in Lake Gaston. It was found by a neighbor on the front seat of a Ford automobile owned by Pennisi. Pen-

nisi's son had driven this automobile in the past but there was no evidence that anyone had driven it subsequent to Pennisi's disappearance or that Pennisi himself had ever driven it. Pennisi left home on 15 June in another automobile owned by him. At the time the note was discovered, Mrs. Pennisi, the finder and two other neighbors, were riding in the automobile. The driver picked up the envelope from the front seat. It contained another envelope, in which was the note.

There was no evidence as to who placed the envelope and note in the car or as to how long it had been there. The outer envelope bore the printed return address of Pennisi's insurance agency. On its face, in the space customarily used for the name and address of the intended recipient of a letter, appeared the typed name, "GLOYD VESTAL," the hand printed word, "IMPORTANT, ' and the message, handwritten and hand printed, "Call me 27 26167 NOW," this being Pennisi's telephone number. The inner envelope bore the single word, "Vestal," and the names "Penny & Rosie," which latter names had been marked through. The note, contained in the inner envelope, was written upon a leaf torn from Pennisi's year book for 1969. The note was a mixture of handwriting and hand printing. Both the handwriting and the hand printing were identified as that of Pennisi. It read:

"I called Tom on June 12 at 11 a.m. He told me you've already collected my money. I want it this morning. Not tomorrow. I haven't slept all nite. So you better not come out with another lie on your mouth. You better call me right away before

I get real mad. I had this put under your door at 3:30 a.m. on June 13th.'

In the note the word "morning" is underlined four times and the word "mad" is underlined three times.

It is apparent that the statement in the note that the writer had it placed under the defendant's door was written in anticipation that this would be done and the messenger, instead, left it on the seat of the car. There is nothing in the record to indicate that the defendant received, saw or knew of the existence of the note. In his interview with Captain Jackson, above mentioned, he stated that he had talked to Pennisi on Saturday, 14 June, and had driven down to Myrtle Beach, South Carolina, that afternoon, returning to Greensboro on Sunday, 15 June, about 7 p.m., shortly before his conference with Pennisi in the latter's automobile, parked in front of the defendant's residence.

The relevance of this note to the State's contention as to the motive for the murder of Pennisi is apparent. From it an inference could be drawn that Pennisi had talked to Thomas Hatzis by telephone on 12 June with reference to the $245,000 note above mentioned and that Hatzis had told him the defendant had already collected Pennisi's money, that Pennisi had concluded the defendant had told him some falsehood about the matter and was demanding his money immediately from the defendant. It could be inferred further that Pennisi was angry with and suspicious of the defendant and was insisting that the defendant go with him to Wilmington, Delaware, to confer with Hatzis about this transaction, which trip the defendant did not desire

to take. The record shows that the solicitor argued substantially this in his speech to the jury. Unquestionably, the introduction of this note into evidence was prejudicial to the defendant.

[37] Obviously, the note is hearsay, being the extra-judicial statement by Pennisi, offered to prove the truth of its contents, that is, to prove the existence of facts which would justify resentment on the part of Pennisi toward the defendant and a state of mind on the part of Pennisi which, in their conversation on Sunday evening, 15 June, could have caused him to threaten the defendant in such manner as to cause him to desire the death of Pennisi. Indeed, it is double hearsay, being Pennisi's extra-judicial statement as to what "Tom" had told him. Buckhorne Land & Timber Co. v. Yarborough, 179 N.C. 335, 339, 102 S.E. 630.

The admission of this note into evidence cannot be justified on the theory that it was a threat communicated to the defendant, for there is no indication in the record that the defendant ever saw it or knew about it. It can be regarded only as an indication of Pennisi's state of mind, which is not shown to have been communicated to the defendant. Prior to the discovery of Pennisi's body in Lake Gaston, the defendant had stated to Police Officer Jenkins that at the time of his conversation with Pennisi on Sunday, 15 June, Pennisi "was upset over the title of a Lincoln automobile, and that he wanted $6,000 that Vestal owed him." This does not, however, indicate that the defendant knew of the note found in the Pennisi automobile, or of Pennisi's claim against

Hatzis.

What the State is here undertaking to do is to use a statement by Pennisi to show Pennisi's state of mind and, from that, to draw an inference that Pennisi, in some other manner, communicated to the defendant this state of Pennisi's mind and, upon that supposition, to infer the formation by the defendant of a determination to kill Pennisi. The use of a written statement by the deceased, uncommunicated to anyone, as the basis upon which to build first a supposition of another, unproved communication with the defendant and then to erect, upon that supposition, an inference as to the defendant's state of mind carries the superstructure beyond limits supported by that degree of credibility which is required for an exception to the hearsay rule. See: Sowers v. Marley, 235 N.C. 607, 70 S.E.2d 670; 29 Am.Jur.2d, Evidence, § 161. We, therefore, hold that it was prejudicial error to admit this note in evidence.

Miscellaneous Objections to Evidence

[38] The defendant assigns as error that the court permitted Maurice Miller to testify, over objection, that when he visited Pennisi in the latter's home about 6 p.m. on Sunday, 15 June, Pennisi discussed, with Miller, Pennisi's business relations with the defendant. The witness did not state the nature of that discussion. He had previously testified, without objection, that Pennisi had discussed with the witness his business relations with the defendant on several occasions. In view of this testimony and the testimony of Captain Jackson and Police Officer Jenkins as to their interviews with the

defendant, in which the defendant related in detail many business transactions with Pennisi, the admission of Miller's general statement that on Sunday, 15 June, Pennisi discussed, with Miller, his business relations with the defendant was not prejudicial.

[39] The defendant assigns as error the admission, over objection, of Ethel Emerson's testimony that her own personal feeling was that the defendant had "moved back" with his wife "because it would make a better show." The conclusion of the witness as to the defendant's reason for returning to his home was not competent. Wood v. Michigan Millers Mutual Fire Insurance Co., 243 N.C. 158, 90 S.E.2d 310; State v. Cuthrell, 233 N.C. 274, 63 S.E.2d 549; Stansbury, North Carolina Evidence, 2d Ed., § 124. Nevertheless, in view of Captain Jackson's testimony concerning the defendant's own statements to him, in the presence of Mrs. Vestal, as to his associations with "Ethel" and Gail Hoyle, plus others unnamed, the statement in question by this witness cannot be deemed substantially prejudicial to the defendant's general character in the eyes of the jury.

[40] The defendant assigns as error the admission, over objection, of the testimony of Lieutenant Gibson to the effect that Mrs. Stanley and her daughter, Miss Cox, were shown a number of pictures, from which they identified one of the defendant's white Cadillac as a picture of the car they had seen in the vicinity of the defendant's flower shop at approximately 8 p.m. on Sunday, 15 June, and that, thereafter, while riding with him, they identified the

defendant's car, then meeting them in a line of traffic. Mrs. Stanley and Miss Cox had previously testified that they saw a white Cadillac in the vicinity of the defendant's flower shop on Sunday, 15 June, at a time identified as approximately 8 p.m. Mrs. Stanley had testified also that, subsequently, while riding with Lieutenant Gibson and her daughter, she saw and identified this car, and pointed it out to Lieutenant Gibson, as they met it on the highway. The testimony of Lieutenant Gibson, to which the defendant objected, was sufficiently corroborative of the testimony of Mrs. Stanley to justify its admission. See State v. Brown, 249 N.C. 271, 106 S.E.2d 232.

There is no merit in any of these assignments of error.

Exceptions to the Charge to the Jury

[41, 42] Since there must be a new trial for the errors above noted in the admission of evidence, it is not necessary to discuss in detail the assignments of error relating to the charge to the jury. We have examined these and find no error therein. The court gave, in substance, all instructions requested by the defendant. There was no request that the term "reasonable doubt" be defined and, in the absence of such request, the failure to include a definition of the term in the charge was not error. State v. Potts, 266 N.C. 117, 145 S.E.2d 307; State v. Browder, 252 N.C. 35, 112 S.E.2d 728. None of the alleged errors in the court's statement of the contentions of the State and of the defendant were called to the attention of the court so as to afford it an opportunity for correction. State v. Butler, 269

N.C. 733, 153 S.E.2d 477. There being no evidence in the record to sustain a verdict of manslaughter, it was not error for the court to omit manslaughter from the possible verdicts which the jury might return. State v. Smith, 268 N.C. 167, 150 S.E.2d 194; State v. Summers, 263 N.C. 517, 139 S.E.2d 627; Strong, N.C. Index 2d, Criminal Law, § 115.

Other Assignments of Error

The remaining assignments of error brought forward in the defendant's brief are either formal or relate to matters which are unlikely to arise upon the retrial of the case and, therefore, need not be discussed.

For the errors above noted in the admission of the State's Exhibits 23 to 30, inclusive, and the note found in the Pennisi automobile, the State's Exhibits 93, 94 and 95, there must be a new trial.

New trial.

BOBBITT, Chief Justice (concurring in result).

I agree that the admitted circumstantial evidence, when considered in the light most favorable to the State, was sufficient to withstand defendant's motion for judgment as in case of nonsuit and to warrant submission of the first degree murder charge as well as the lesser included offenses of second degree murder and manslaughter.

I agree also that the admission in evidence of the note and envelopes found in a Pennisi car between the date of Pennisi's disappearance (June 15th) and the date his body was found in Lake Gaston (June 21st) was prejudicial error and, standing alone, is sufficient to require a new trial. The facts

with reference thereto are set forth in the majority opinion. Suffice to say, the contents of Pennisi's uncommunicated written statements concerning his relationship with defendant were properly rejected as heresay. The effect of the erroneous admission thereof was to allow Pennisi to testify at trial through the medium of his identified writings.

I disagree with that portion of the majority opinion which holds competent all of the testimony of Mrs. Pennisi as to what Pennisi told her on Sunday, June 15th, and in doing so undertakes to approve generally an exception to the hearsay rule heretofore unrecognized in this jurisdiction and which, in my opinion, is wholly inapplicable to the present factual situation and portends dangerous consequences.

The question here is whether Pennisi should have been permitted to testify through the medium of his wife's testimony concerning his plans for Sunday, June 15th. Admittedly, this is hearsay testimony. In my view, such testimony should be admitted only under the most compelling circumstances and then only under strict limitations.

The general rule the majority opinion seeks to establish is stated and approved in State v. Journey, 115 Conn. 344, 161 A. 515 (1932), where Journey appealed from his conviction for murder in the first degree. The widow of Buda, the deceased, when asked on direct examination what her husband said when he left home the morning he died, was permitted to testify over the defendant's objection "that he said he was going to work for Journey." Later that day, Buda's body was found in the ruins of an

old barn on abandoned property. The evidence was that his death had been caused by gunshot wounds, not by burning. There was circumstantial evidence tending to show that Buda and the defendant had been together that morning. **In addition,** the evidence included testimony that defendant admitted to officers "that he had killed Buda, but had no good reason for doing so." A new trial was awarded on the ground there was no evidence of premeditated murder.

With reference to the admission of the widow's testimony as to Buda's declarations, the court said: "The existence of a plan or intention to do a thing is relevant to show that the act was probably done as planned. The plan of intention, being a condition of mind, may be evidenced, under an exception to the hearsay rule, by the person's own statement as to its existence. **A declaration indicating a present intention to do a particular act in the immediate future, made in apparent good faith and not for self-serving purposes, is admissible to prove that the act was in fact performed.** It is admissible, not as a part of the res gestae but as a fact relevant to a fact in issue. (Citations omitted.) A fact in issue in the case was whether Buda was in the company of the accused on the morning in question. His plan or intention to go to his house was a fact relevant to a fact in issue, and his own declaration that such was his intention was admissible in proof of such relevant fact." (My italics.)

In accord with Journey, other cases cited in the majority opinion hold that such declarations of a present intention to do a particular act in the immediate future are admissible **to prove that the act**

was in fact performed.

An evaluation of the rule stated in the quoted excerpt from State V. Journey, supra, will be set forth below. Whatever its merits, the rule does not apply in the present factual situation.

When first examined, Mrs. Pennisi testified that on Sunday, June 15th, Pennisi was planning to leave that evening at six o'clock to go to Wilmington, Delaware on a business trip; that, "around 5 o'clock," he received a phone call and, as a result thereof, "(t)he time he was to leave changed"; that at 6:55 he left the house, "went out one door and came back in another and got his raincoat * * * and then he left again"; and that he took with him a shaving kit but no suitcase.

Later, Mrs. Pennisi, upon recall for further testimony, was permitted to testify, over defendant's objections, that Pennisi, before leaving the house on Sunday, June 15th, said that he was going on a business trip "with Mr. Gloyd Vestal"; that during the previous week she and Pennisi had discussed this trip "(s)everal times"; and that during the afternoon of that day he said he was going to Wilmington, Delaware, with "Mr. Gloyd Vestal to see about an investment that he had made in that area."

Immediately after Mrs. Pennisi's testimony upon recall, the State offered the testimony of Captain W. H. Jackson, an investigating officer, who testified to his conversation with defendant in Jackson's office on **July** 14, 1969. Jackson testified, **inter alia,** that defendant told him that on Saturday, June 14th, Pennisi had come by and talked with him, saying "that he was having trouble with his brothers and his

father in New York and wished (Vestal) to go there with him"; that Vestal then agreed to make the trip to New York with Pennisi; that Vestal telephoned Pennisi later and told him he could not make the trip; that on Sunday, June 15th, about 8:00 p.m., Pennisi drove up in front of defendant's home; and that defendant got in the car with Pennisi and they talked "about various things," Pennisi stating, **inter alia,** that he would not be going to New York until the following day.

The **fact** that Pennisi told his wife he was going to Wilmington, Delaware, on a business trip with no luggage other than a shaving kit would be competent to explain (1) why she was not disturbed by Pennisi's absence until after he failed to come home when expected, that is, on the night of Monday, June 16th, and (2) why she waited until Wednesday, June 18th, before she reported Pennisi's absence to the Greensboro Police Department.

The State contends, and its evidence tends to show, that Pennisi was killed in Greensboro on the night of Sunday, June 15th. Whether Pennisi went to Wilmington, Delaware, on Sunday, June 15th, for any purpose, with or without defendant, **was not a fact in issue.** The testimony as to what Pennisi told his wife was not offered to prove that Pennisi **went** to Wilmington, Delaware, on Sunday, June 15th. The impact of this testimony was to show that defendant's statements to Captain Jackson as to a proposed trip with Pennisi **to New York** and **the purpose thereof** was in conflict with Pennisi's statements to his wife as to a proposed trip with Vestal to Wilmington, Delaware, and **the purpose**

thereof. In my opinion, the statements attributed to Pennisi by his wife were not competent to show the falsity of the conflicting statements attributed to defendant by Captain Jackson and the admission thereof under the circumstances was prejudicial error.

Whatever is said in this case concerning the rule stated in the quoted excerpt from State v. Journey, supra, must be considered **dicta** in later cases involving factual situations in which that rule might be pertinent. However, the approval of that rule in the majority opinion impels me to consider it on its merits and in the light of its conflict with our decisions.

Decisions cited in the majority opinion, in addition to State v. Journey, supra, include Mutual Life Ins. Co. of New York v. Hillmon, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892); Hunter v. State, 40 N.J.L. 495 (1878); Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961 (1892); People v. Alcalde, 24 Cal.2d 177, 148 P.2d 627 (1944).

In Hillmon, a much discussed decision (see Maguire, The Hillmon Case—Thirty-Three Years After, 38 Harvard Law Review 709 et seg.), the insurance companies, as a defense to actions on the policies to recover death benefits, asserted that Hillmon, the insured, was not dead but was alive and in hiding. Decision turned upon whether the body found at Crooked Creek on the night of March 18, 1879, was the body of Hillmon, as asserted by plaintiff, or the body of Walters, as asserted by the defendants. Much conflicting evidence was offered as to the identity of the body. The plaintiff also proffered evi-

dence that Hillmon and Brown had been traveling together through southern Kansas in search of a site for a cattle ranch and that on March 18th, while they were in camp at Crooked Creek, Hillmon was killed by the accidental discharge of a gun. The defendants offered evidence that Walters had left his home and his betrothed in Iowa in March, 1878, and was afterwards in Kansas until March, 1879; that during that time he corresponded regularly with his family and his betrothed; that the letters received from him included one received by his betrothed on March 3rd, and postmarked at Wichita on March 2nd, and one received by his sister about March 4th or 5th, and dated at Wichita a day or two before; and that he had not been heard from since. The last letter of Walters to his sister included a statement that he expected "to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to (him)." The last letter from Walters to his betrothed included a statement that he was "going with a man by the name of Hillmon, who intends to start a sheep ranch"; that Hillmon had promised him more wages than he could make at anything else; and that he would be able to get "to see the best portion of Kansas, Indian Territory, Colorado, and Mexico."

Upon objection by the plaintiff, the trial judge excluded these letters from Walters to his sister and betrothed. The Supreme Court of the United States held these letters should have been admitted in evidence; and, on account of the exclusion of these letters and on account of another (unrelated) error, the defendants were awarded a new trial. The following excerpts from the opinion of Mr. Justice

Gray are noted.

"The evidence that Walters was at Wichita on or before March 5th, and had not been heard from since, together with the evidence to identify as his the body found at Crooked Creek on March 18th, tended to show that he went from Wichita to Crooked Creek between those dates. Evidence that just before March 5th he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked Creek with Hillmon. Letters from him to his family and his betrothed were the natural, if not the only attainable, evidence of his intention. * * *

"The letters in question were competent, not as narratives of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidnce tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention. In view of the mass of conflicting testimony introduced upon the question whether it was the body of Walters that was found in Hillmon's camp, this evidence might properly influence the jury in determining that question."

In Hillmon, Mr. Justice Gray quotes a portion of the opinion of Chief Justice Beasley in Hunter v. State, supra, 40 N.J.L. at 538. The New Jersey Court of Errors and Appeals affirmed the judgment of the Court of Oyer and Terminer where Hunter had

been convicted of the first degree murder of John M. Armstrong. On appeal, Hunter assigned as error, **inter alia,** the admission of evidence of statements made by Armstrong in Philadelphia to his son during the afternoon of January 23rd and of evidence as to statements in a letter written by Armstrong to his wife that afternoon, both to the effect that Armstrong was going to Camden, New Jersey, that night with Hunter. The State's evidence tended to show that Armstrong was killed that night in or near Camden.

The two sentences of the opinion of Chief Justice Beasley which precede the portion quoted by Mr. Justice Gray (and brought forward in the majority opinion herein) are as follows: "The present point of inquiry therefore is, whether these declarations of Mr. Armstrong to his son, and the similar declaration contained in the note to his wife, can reasonably be said to be component parts, or the natural incidents of the act of the deceased in going to Camden, which act was incontestably a part of the **res gestae.** After mature reflection and a careful examination of the authorities, my conclusion is, that these communications of the deceased should be regarded as constituents of that transaction, for I think they were preparations for it, and thus were naturally connected with it." In concluding this portion of the opinion, Chief Justice Beasley observed: "It is principally from the foregoing considerations that I find myself constrained to think that the declarations under discussion, even if they stood in the case unsupported or unaffected by other circumstances, were admissible, on general principles, on the single ground that they were the nat-

ural and inartificial concomitants of a probable act, which itself was a part of the **res gestae.** In such a **status** of the evidence, I should think that the exception to the principle that rules out hearsay, **had been carried to its extreme limit, but without transscending such limit.** But, in point of fact, the question thus discussed is not, on this record, presented in this narrow point of view, for it is, in the proofs, connected with facts that appear to put the admissibility of these declarations on a stable foundation." (My italics).) There was evidence tending to show that Hunter had proposd to Armstrong that they go together to Camden on the night of the murder. Declarations of Armstrong were held competent and were admitted to show a mutual understanding to that effect.

In People v. Alcalde, supra, Florencio "Frank" Alcalde was convicted of murdering Bernice Curtis, whose dead body was found on the morning of November 23, 1942. The defendant contended that prejudicial error was committed by admitting in evidence over objection the declarations of the deceased made on November 22nd that she was going out with "Frank" that evening. The majority opinion disposes of this contention in these words: "In overruling the objection the court took the precaution to state in the presence of the jury that the evidence was admitted for the limited purpose of showing the decedent's intention. It is argued by the defendant that declarations not under oath, made when the declarant is not confronted by the adverse party, are admissible to prove physical or mental condition and only when either condition is a matter in issue. The admission of such utter-

ances, due caution having been taken by the court as here, is not so limited.' There was independent circumstantial evidence that the defendant was at the scene where the body was found.

I am impressed by the force of the dissenting opinion of Justice (later Chief Justice) Traynor in People v. Alcalde, supra, which includes the following: "A declaration of intention is admissible to show that the **declarant** did the intended act, if there are corroborating circumstances and if the declarant is dead or unavailable and hence cannot be put on the witness stand. * * * A declaration as to what one person intended to do, however, cannot safely be accepted as evidnce of what another probably did. * * * The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her. In the words of Mr. Justice Cardozo, 'Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.' Shepard v. United States, 290 U.S. 96, 104, 54 S.Ct. 22, 25, 78 L.Ed. 196. Such a declaration could not be admitted without the risk that the jury would conclude that it tended to prove the acts of the defendant as well as of the declarant, and it is clear that the prosecution used the declaration to that end. There is no dispute as to the identity of the deceased or as to where she was at the time of her death. Since the

evidence is overwhelming as to who the deceased was and where she was when she met her death, no legitimate purpose could be served by admitting her declarations of what she intended to do on the evening of November 22d. The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her. Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay."

It is noted that the views expressed by Justice Traynor are those applied by Chief Justice Pearson in State v. Dula, 61 N.C. 211 (1867), and State v. Dula, 61 N.C. 437 (1868), discussed below.

Although not cited in the majority opinion, State v. Farnam, 82 Or. 211, 161 P. 417 (1916), involves questions similar to those heretofore considered. Upon appeal, the plaintiff's conviction of manslaughter was affirmed. The majority held competent the declarations of the deceased that she could not go home with Mabel that night "because she thought Roy (Farnam) was coming down." The body of the deceased was found the next morning in the ruins of a barn which had burned during the night. Decisions cited in the concurring opinion of Justice Harris to support the majority view include Hillmon and Hunter. Decisions to the contrary are cited in the dissenting opinion of Justice Burnett. Justice Harris, speaking for the majority, stated: "Even though it be assumed that the testimony moved against was incompetent, nevertheless, the defendant is in no position to claim that he was materially

prejudiced by it." There was independent evidence that the defendant had been to the scene where the body was found.

Justice Harris added: "If evidence is competent for one purpose, it cannot be rejected merely because it is not competent for another purpose. Being competent to show what Edna Morgan intended to do, the testimony of Mabel Barton was not rendered incompetent for all purposes merely because it was incompetent for the purpose of connecting Roy Farnam with the alleged crime, **although it would have been proper to instruct the jury to limit the evidence to the sole purpose for which it was competent, and a failure to give a requested instruction to limit the application of the evidence to the single purpose for which it is admissible would be error; but here the contention is that the testimony was not competent for any purpose.**" (My italics)

An additional statement from the opinion of Justice Harris is noted: "Declarations, like the one considered here, are, by many, and perhaps, by most, of the authorities, admitted as part of the res gestae; they are spoken of by some as verbal acts; they are characterized by others as original evidence admissible as an exception to the hearsay rule." Thus, the admission of the declarations in State v. Journey, supra, was on the ground that they constituted original evidence admissible as an exception to the hearsay rule. On the other hand, in Hunter v. State, supra, which is cited and relied on in Journey, the admissions were held properly admitted as part of the **res gestae.**

The question presented in Commonwealth v. Trefethen, supra, is sufficiently different to warrant full consideration of that case. Trefethen was convicted of the first degree murder of Deltena J. Davis (Deltena). Circumstantial evidence offered by the Commonwealth tended to show that Deltena, who was unmarried, left her home on December 23, 1891; that she was then "about five months advanced in the state of pregnancy"; that her body was found in the Mystic River on January 10, 1892, about three miles from her home; that the cause of her death was drowning; and that "(t)here were no marks of violence on the body when found, nor was there any evidence that poison had been administered, nor did her clothing show any signs of violence." 157 Mass. at 182, 31 N.E. at 962. The defendant offered a witness who testified to a conversation she had with Deltena on December 22nd. When objection was made to the testimony of this witness, counsel for the defendant stated to the court, in the absence of the jury, that they offered to prove by this witness that, at the interview on December 22nd, Deltena "stated to the witness that she was five months pregnant with child, and had come to consult as to what to do, and added later in the interview that she was going to drown herself." The verdict was set aside for error in excluding the testimony of this witness.

The defendant's counsel did not contend, nor did the court hold, that the statements attributed to Deltena were admissible as part of the **res gestae.** They contended "that the declaration is some evidence of the state of mind or intention of the deceased at the time she made it, and that the intention which it

tends to prove is a material fact, which, in connection with other facts proved, tends to support the theory of suicide. They contend that the state of mind or intention in the mind of a person, when material, can be proved by evidence of his declarations as well as of his acts, particularly when that person has deceased, and cannot be called as witness, and the declarations were made before the controversy arose which is the subject of the trial." Accepting this contention, the court held: "The fundamental proposition is that an intention in the mind of a person can only be shown by some external manifestation, which must be some look or appearance of the face or body, or some act or speech; and that proof of either or all of these, for the sole purpose of showing [state of mind or intention of the person is proof of a fact from which] the existing state of mind or intention, may be inferred."

In my opinion, the admissibility of evidence of statements attributed to a deceased person where **the statements themselves** indicate the declarant's state of mind, **e. g.,** that he was confused, distraught, hysterical, mad, etc., when he made them, and his state of mind at that time was an evidential fact material to the fact in issue, is a different question from that presented where the testimony as to the deceased's declarations is offered solely for the purpose of showing that the deceased in fact later did what he declared he intended or planned to do. In Trefethen, it was conceded the declarations of Deltena were not competent as evidence that she had killed herself. It was held they were competent as indicating her state of mind when she made the statements; and that her state of mind at that time

was an evidential circumstance which, when considered with other evidence in the case, was competent as bearing upon whether Deltena committed suicide. It is noted that the statements attributed to Deltena did not involve any other person.

In my opinion, Journey, Hillmon, Hunter, Alcalde and Farnam may be considered authority for this statement from McCormick, Law of Evidence, Hornbook Series, § 270 at 575-576 (1954), to wit: "Whenever declarations of intention are offered **as evidence of the declarant's subsequent conduct** the question of admissibility of the evidence should be clearly discriminated from its sufficiency to support a finding that such conduct occurred. Standing alone such declarations would in the usual situation manifestly be insufficient to warrant such a finding, and accordingly it is frequently said that declarations of intention are admitted in corroboration of other evidence to show such acts. Insufficient as they frequently are, separately considered, they nevertheless may be significant contributions to an aggregation of evidence sufficient to establish the act and the identity of the actor, and as such they will generally be admitted." (My italics.)

If there had been independent evidence that Pennisi was killed in Wilmington, Delaware, then, assuming the rules stated in the decisions discussed above were adopted by this Court, deceased's declarations on Sunday, June 15th, of his intention to leave that day for Wilmington, Delaware, with defendant would have been admissible **as tending to show he acted in accordance with his declared intention.** The evidence as to Pennisi's declarations

was not offered for this purpose. The State's evidence is to the effect he did not go to Wilmington, Delaware, but was murdered in Greensboro, N. C. Whatever its merits, the proposed additional exception to the hearsay rule should not be approved until a factual situation to which its application would be pertinent is before us.

Attention is directed now to North Carolina decisions which involve factual situations similar in certain respects to those involved in the decisions discussed above. In each, the admissibility of the declarations was considered in terms of the **res gestae** exception to the hearsay rule. Even so, **the authority** of these decisions consists in the holding that the evidence was incompetent in the factual situation presented.

In State v. Dula, 61 N.C. 211 (1867), the defendant having been convicted and sentenced for first degree murder, was awarded a new trial because the court admitted, over the defendant's objection, the testimony of one Betsey Scott that she saw Laura Foster, the deceased, on the morning of the day she was missing; that "she was riding her father's mare, bareback, with a bundle of clothes in her lap"; and that Laura said (1) that she was on her way to the Bates place, and (2) that Dula (defendant) had returned just before day, and (3) that she "expected to meet him at the Bates place." Chief Justice Pearson, for this Court, said: "The conversation between Mrs. Scott and the deceased ought not to have been admitted as evidence. At all events, no part of it except that the deceased said she was going to the Bates place. How what the deceased said

in regard to the prisoner's having come just before day, and where he was, and that she expected to meet him, can in any sense be considered a part of the acts of deceased—being on her father's mare, bareback, with a bundle of clothes in her lap, and coming from her father's past A. Scott's house, when the witness met her in the road—we are unable to perceive. The law requires all testimony, which is given to the jury, to be subject to **two tests of its truth:** 1. It must have the sanction of an oath. 2. There must be an opportunity of cross-examination. **Dying declarations** form an exception, and another exception is allowed when declarations constitute a part of the act, or **res gestae.**" Accord: Mullins v. Commonwealth, 113 Va. 787, 75 S.E. 193 (1912).

This Court found no error in the trial and conviction of Dula at his second trial. State v. Dula, 61 N.C. 437 (1868). It was there held that testimony as to the statement of Laura Foster, while riding in the direction of the Bates place, that **she** was going to that place, was properly admitted. Her declaration as to where she was going when headed in that direction was considered a part of the **res gestae.** At the second trial, no attempt was made to offer in evidence any declaration of Laura as to Dula's plans and conduct.

In Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120, the question was whether the dependents of Harry C. Gassaway (Gassaway) were entitled to compensation on account of his death on Saturday, June 29, 1940, about 1:00 p. m., as the result of an automobile wreck on the road from

Winston-Salem to High Point. Gassaway was the president and one of the principal stockholders of defendant. Defendant appealed from a judgment affirming an award made to the claimants by the North Carolina Industrial Commission. This Court reversed on two grounds, **vis.:** (1) Statements made by Gassaway the preceding Thursday and Friday night to the effect he was trying to get a certain highway job in High Point and planned to go there on Saturday for that purpose were held incompetent because "no part of the **res gestae**"; and (2) these statements tended to show Gassaway's intended Saturday trip was not to perform any service of an ordinary employee or workman but to negotiate a contract as an executive officer of defendant.

In Little v. Power Brake Co., 255 N.C. 451, 121 S.E.2d 889 (1961), the question was whether the dependents of Arthur Herman Little were entitled to compensation on account of his death as a result of an automobile accident that occurred on January 8, 1957, about 8:25 p. m., at or near the intersection of N. C. Highway 41 and a rural paved road, about four miles south of the city limits of Lumberton. The Industrial Commission denied compensation, the superior court affirmed and the claimants appealed. This Court affirmed on the ground the claimants failed to offer competent evidence sufficient to support a finding that the death was by accident arising out of and in the course of the deceased's employment by defendant.

The claimants assigned as error the exclusion by the court of declarations attributed to the deceased, offered to show the purpose of the deceased's trip

and that he was engaged in work for his employer at the time of his death. The substance of these statements and of the rulings of this Court is set forth in the following excerpt from the opinion of Justice (later Chief Justice) Parker, to wit:

"The deceased employee left the motel in Laurinburg on his fatal trip about 7:30 p. m. o'clock. His statement of H. F. Hoffman about 10:45 a. m. o'clock, 'I've got to be going along, I've got to be down at Whiteville to see a customer sometime today,' was not connected with his act of departure at 7:30 p. m. o'clock, constitutes no part of the **res gestae,** and was inadmissible.

"The deceased employee, after buying gas and talking with Z. R. Jackson at a service station went back to the motel, from there talked to his wife in Charlotte by telephone, went to the motel's office, and there T. T. McNair, manager of the motel, pointed out to him on a North Carolina highway map a route from Laurinburg to Lumberton, to Elizabethtown to White Lake to Burgaw, a distance of about 115 miles. His parents-in-law lived six miles north of Burgaw. He then ate supper in the motel dining room, and left on his fatal trip at 7:30 p. m. o'clock. In his statement to Jackson he said he was going to Lumberton and had a little business to attend to there, but he did not say it was his employer's business, or where he was going to in Lumberton. In our opinion, his statement to Jackson was not connected with his act of departure at 7:30 p.m. o'clock, and constitutes no part of the **res gestae,** and we are fortified in our opinion by the fact that he was killed by accident about four miles south of the city limits of Lumberton. In addition, claimants offered

this evidence for the purpose of showing the purpose of his trip, and that he was engaged in work for his employer at the time of his death, but his statement to Jackson does not say what his business was in Lumberton, and has no relevancy to the fact sought to be proved. It was properly excluded.

"We now come to his statement by telephone to his wife around 7:00 o'clock p. m., 'that he was going to call on some more customers, so that he wouldn't have to spend another night, etc.' He did not state who these customers were, or where they lived. After his conversation he went to the motel's office, and its manager pointed out to him on a North Carolina highway map a route from Laurinburg to Burgaw, near which place his parents-in-law lived. He then ate supper, and left. He was killed outside his regular selling territory by accident about an hour and a half later."

The following excerpt from the opinion discloses that this Court was well aware of the divergent views as to whether the competency of such declarations should be tested by application of the **res gestae** exception to the hearsay rule on the basis of a different specific exception to the hearsay rule. The opinion states: "The rule that statements made by a person since deceased, as to the purpose or destination of a trip or journey he is about to make, may be proved as part of the **res gestae** when connected with the act of departure, has been recognized and given effect in the admission of such testimony in a considerable number of cases, and the evidence has been excluded in a number of other cases because not part of the **res gestae**, though recogniz-

ing the rule. Gassaway v. Gassaway & Owen, Inc., 220 N.C. 694, 18 S.E.2d 120; Anno. 113 A.L.R. 268-310, an elaborate annotation where a very large number of cases are cited and analyzed; Anno. 163 A.L.R. 21-25; Jones on Evidence, 2nd Ed., Vol. III, § 1220. Other theories for the admission of such statements have been propounded, but the 'theory of **res gestae** is by far the most popular theory of admission, though possibly not as well reasoned as the theory that the declarations are admissible as original evidence, as an exception to the hearsay rule.' Anno. 113 A.L.R. 275. An extaordinary development in the literature of **res gestae** was Dean Wigmore's wholesale denunciation of the term itself. Evidence, 2nd Ed., § 1767. However, it is said in annotation 163 A.L.R. 20, 'The bench and bar in general have not agreed with Dean Wigmore.' "

In Little v. Power Brake Co., supra, there was no independent evidence that the deceased had visited any customer on the night of his fatal accident or that the accident occurred when he was en route to a customer's place of business.

The general rule the majority opinion seeks to approve recognizes that the death of a declarant standing alone, is not sufficient ground for the admission of his declarations. Justification therefor is said to be found in what is called a **reasonable probability of truthfulness.** If admissibility is to be determined on this broad ground, the rule against hearsay evidence would be greatly impaired and presumably probability of truthfulness in a particular case would be determined by the presiding judge after a **voir dire** hearing. Whether a particular

person is more inclined to tell the truth to his wife, his friend, or a stranger, when he is about to depart on a journey rather than on occasions unrelated to such departure, is subject to question. Certainly, the reasonable probability of the truthfulness of such declarations cannot be compared to the reasonable probability of the truthfulness of a dying declaration.

A dying declaration is admissible only if made when the declarant is in actual danger of death, in full apprehension of his danger and death ensues. State v. Brown, 263 N.C. 327, 332, 139 S.E.2d 609, 612 (1965). When admitted, the credibility of the declarant and the weight to be given his dying declaration is for determination by the jury. It is subject to impeachment or corroboration in the same manner as the testimony of a witness who testified in person at trial. State v. Debnam, 222 N.C. 266, 22 S.E.2d 562 (1942), and cases cited; Stansbury, North Carolina Evidence § 146, at 363 (2d ed. 1963); Note, 14 N.C.L.Rev. 380, 382-383 (1936); 40 Am. Jur.2d Homicide § 390 (1968); 40 C.J.S. Homicide § 305 (1944); 1 Wharton's Criminal Evidence § 328 (12th ed. Anderson 1955); 5 Wigmore, Evidence § 1446 (3d ed. 1940); 2 Underhill's Criminal Evidence § 299 (5th ed. Herrick 1956).

If declarations of a deceased person are offered as evidence of the truthfulness of the statements contained therein, and such statements are admitted because of what is considered **the reasonable probability of their truthfulness,** it would seem that such declarations would be subject to impeachment or corroboration in the same manner as the

testimony of a witness who testifies in person at trial.

As stated in the outset, I think **the fact** that Pennisi told his wife he was going to Wilmington, Delaware, on a business trip with no luggage other than a shaving kit, would be competent to explain (1) why **she** was not disturbed by Pennisi's absence until after he failed to come home when expected, that is, on the night of Monday, June 16th, and (2) why **she** waited until Wednesday, June 18th, before she reported Pennisi's absence to the Greensboro Police Department, **and for no other purpose.** Whatever its merits, it is both unnecessary and unwise to approve in general terms an additional exception to the hearsay rule when the case before us does not call for its application or consideration and when approval thereof tends to impair the authority of prior decisions of this Court.

HIGGINS and SHARP, JJ., join in the concurring opinion.

MOTIONS TO SUPPRESS EVIDENCE UNDER FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND PROCEEDINGS THEREON IN SECOND TRIAL

After lunch and out of the presence of the jury:

COURT: Before the State has offered any evidence in the case but after the jury has been impaneled, the counsel for the defendant states that he wishes to make certain motions in advance.

ATTORNEY CAHOON: The defendant moves the court to suppress the evidence obtained in this case by the use of the search warrant in the search of the defendant's warehouse. The motion is the same motion which was made at and in the original trial of this case at the May 4, 1970 session before Judge Walter Johnson, and it is the same motion set forth in full with the reasons therefore in the case on appeal in this case which is reported in 278 NC 561. We submit to your Honor the record and brief which was submitted to the Supreme Court which sets the matter out with the reasons for the motion and move that your Honor accept that sworn testimony which was presented to the court before without the necessity of going through with it again.

SOLICITOR ALBRIGHT: No objection to that, your Honor.

COURT: The solicitor for the State agrees that it shall be so submitted and therefore the court overrules the motion and defendant reserves an exception.

EXCEPTION NO. 1

ATTORNEY CAHOON: The defendant moves to suppress the evidence obtained by the search of

his warehouse without a search warrant and the circumstances of that search are fully set forth in the original case and shows that the defendant had received some threats that his premises would be bombed and he communicated with the police department and the police suggested that they go with him and make a search of his premises and that he permit them to do so, and he went with them while they did so and in that search, among other things, they told of observing stains and hair, the inference being it was the blood and hair of the deceased person, and the police observed the yellow and golden drapes subsequently used against the defendant, and any of the fruits of that search we move to suppress and for the same reasons as set out in the record and our brief presented to the Supreme Court in this case.

SOLICITOR ALBRIGHT: Your Honor please, our position is the same as at the last trial, that is, that the search was a voluntary consensual search and our argument would be the same in this trial as at the previous trial and I believe that appears as of record.

COURT: You have no objection to using the record from this other trial?

SOLICITOR ALBRIGHT: I have no objection to submitting the record from the other case as the evidence would be identical, I don't know of anything additional in the sworn testimony as to the issue.

COURT: On that basis this court overrules the objection and for the same reasons the appellant reserves his exception.

EXCEPTION NO. 2

SOLICITOR ALBRIGHT: I want to offer the search warrant in the record with the express provision that it will not be presented to the jury.

COURT: Let the record show that he offered the search warrant into the record for the purpose of this hearing only, not to be shown to the jury upon any circumstances.

CHARGE OF COURT TO JURY, SECOND TRIAL, WITH EXCEPTIONS THERETO

COURT'S CHARGE TO JURY

(Defendant reserves an objection and exception to each portion of the charge enclosed in brackets.)

Now, ladies and gentlemen of the jury, the defendant in this case was originally charged in a bill of indictment which reads as follows: "The State of North Carolina, County of Guilford, in the General Court of Justice, Superior Court Division, September 29, Criminal Session, 1969, The State of North Carolina v Gloyd A. Vestal, indictment murder. The jurors for the State upon their oath do present that Gloyd A. Vestal, late of the county of Guilford, on the 15th day of June, 1969, with force and arms, at and in the county aforesaid, feloniously and wilfully, premeditated and deliberated and out of his malice aforethought did kill and murder Angelo S. Pennisi, contrary to the form of the statute in such case made and provided and against the peace and dignity of the stated. Signed Charles T. Kivett, Solicitor"

Upon the call of the case for trial the Solicitor for the State announced that he would not ask for a verdict of murder in the first degree but that he

would ask for a verdict of guilty of murder in the second degree
[or such other verdict as the evidence in the case would warrant]

EXCEPTION NO. 279

Thereupon the defendant in open court entered a plea of not guilty.

Now when he pled not guilty a presumption of innocence surrounds him throughout the trial of the case and entitles him to an acquittal at your hands unless and until the State of North Carolina by competent evidence has satisfied you and each of you of his guilt and beyond a reasonable doubt. Now what is a reasonable doubt? It is not a vain, imaginary or fanciful doubt, but it is a sane and rational doubt. It is not a doubt suggested by the ingenuity of counsel, but it is a doubt based on common sense. When it is said that a jury must be satisfied of a defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge. So if after considering and weighing and comparing the evidence the minds of the jurors are left in such a condition that they cannot say they have an abiding faith to a moral certainty of the truth of the charge, then they have a reasonable doubt, otherwise not.

In this case as in all criminal cases, the burden of proof is upon the State of North Carolina from the beginning to the end of the trial. There is no burden on the defendant to disprove anything, for the case of the State must fail if upon the whole of the evidence the State has not satisfied you and

each of you of the defendant's guilt beyond a reasonable doubt.

Now in this case the Court charges you that you may bring in one of
[three]

verdicts. Guilty of murder in the second degree [or guilty of manslaughter]

EXCEPTION NO. 280

or not guilty. So your charge is to say by your verdict whether the defendant is guilty of murder in the second degree

[or manslaughter]

EXCEPTION NO. 281

or not guilty. In order that you, ladies and gentlemen, may be in a better position to pass upon the guilt or the innocence of the defendant, I shall now undertake to define to you what under the laws of the State of North Carolina is murder in the second degree

[and what is manslaughter.]

EXCEPTION NO. 282

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.

[Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.]

EXCEPTION NO. 283

[The distinction between murder in the second degree and manslaughter is that there is a presence of malice in the offense of murder in the second

degree accompanied by an unlawful killing and in manslaughter there is an absence of malice, leaving only an unlawful killing.]

EXCEPTION NO. 284

Malice is not only hatred, ill will or spite as it is ordinarily understood, but it also means that condition of the mind which prompts a person to take the life of another unlawfully without just cause, excuse or justification. It may be shown by evidence of hatred, ill will and dislike. As I have already indicated, malice is an essential agent of the crime of murder in the second degree. I have already told you what would constitute that. Malice may be general or particular, expressed or implied. Some have said that general malice is wickedness, a disposition to do wrong. A black and diabolical heart, regardless of social duty and fatally bent on mischief. Malice is a condition of the mind from which flows an unlawful and injurious act committed without legal justification or excuse.

Intent in law is the exercise of intelligent will, the mind being fully aware of the nature and consequences of the act that is about to be done and with such knowledge, and with full liberty of action, willing and electing to do it. Intent is an action or emotion of the mind, seldom, if ever capable of direct or positive proof, but is arrived at by such just and reasonable deductions as from the acts and facts proved, as the guarded judgment of a reasonably prudent and cautious man would ordinarily draw therefrom. It is usually shown only by acts, declarations and circumstances known to the party charged with the intent.

[Manslaughter is of two kinds, voluntary and involuntary. In this case we are concerned with voluntary manslaughter. Voluntary manslaughter is an intentional homicide, done in sudden passion or heat of blood caused by something which the law recognizes as adequate provocation, and not with malice aforethought, and not with premeditation and deliberation.]

EXCEPTION NO. 285

[The most common example of manslaughter is where one unlawfully kills another by reason of anger, suddenly aroused by provocation which the law deems adequate; anger naturally aroused from such provocation and the killing being done before time has lapsed for passion to subside and reason to reassume her sway. In such case, the anger so aroused is held to displace malice and will reduce the unlawful homicide to the grade of manslaughter.]

EXCEPTION NO. 286

[If the killing, though intentional, be committed under the influence of passion or the heat of blood, produced by an adequate or reasonable provocation and before a reasonable time has lapsed for the blood to cool and reason to resume its habitual control, and is the result of temporary excitement by which the control of reason was obscured, rather than any wickedness of heart or cruelty or reckless disposition, then the law out of indulgence to the frailty of human nature, or rather in recognition of the law upon which human nature is constituted, have properly regarded the offense as of less heinous character than murder, and gives it the designation of manslaughter.]

EXCEPTION NO. 287

[However, the legal provocation that will reduce murder in the second degree to manslaughter must be more than mere words. No language, however abusive, neither excuses or mitigates the killing, and the law does not recognize circumstances as legal provocation which in themselves do not amount to an assault.]

EXCEPTION NO. 287(a)

In this case the State has offered evidence tending to show the following: First, through the witness, Richard D. Harold, who identified himself as living in Richmond, Virginia. Now he gave evidence tending to show that on June the 16th, he was in the area of Lake Gaston—

ATTORNEY CAHOON: That was the 19th, I believe, Your Honor.

COURT: Excuse me, I beg your pardon. That he was in the area of Lake Gaston June 21, 1969. That on this date, about six-thirty a.m., that he went fishing, this being a Saturday morning and he fished for ten or fifteen minutes. That the lake was foggy in this area. That he observed another fisherman in the area by the name of J. M. Henry, and that he observed an object twenty-five to forty feet away. That because of what he observed he went and called the police in South Hill, Virginia, and had Mr. Henry go back and stay by the object that he had seen and that later the police came and a picture was taken which is State's Exhibit "1", which was shown to you. And that he said that was what he saw there in the water, and it being a human body. You will recall that and you will recall the picture

was used for the purpose of illustrating his testimony, if you find that it does.

Further evidence was offered by a man by the name of Hubert Perkins, that was later identified as being with the rescue squad in South Hill and he came to the scene and he assisted in removing the body from the water by putting a line on it, and he identified this picture that you saw and he identified the other pictures, State's Exhibits "2" through "5". These were offered for the purpose of illustrating the testimony of the witness, if you find that it does. That this was a large man and that the chains weighed seventy pounds. That is what his evidence tends to show for the State and the defendant. What it does show is for you the jury to say and determine.

With that the State introduced W. E. Newman, the Sheriff of Mecklenburg County, Virginia. That on the occasion in question he went to the scene and saw the body brought in. That he was dead. That he later had the hands taken off and had someone to carry them to Washington, D. C. That is what his evidence tends to show, what it does show is for you the jury to say and determine.

And with that they called to the stand John Kirkland, who identified himself as a deputy sheriff of the same county. That on the day in question that he was directed by the Sheriff to go to Richmond to carry the hands of the body to Washington, D. C., to the FBI Laboratory. That in Richmond, Virginia he saw Dr. Chapman, who was the medical examiner for the State of Virginia. That he took these hands in a bucket and signed a receipt for them and car-

ried them to the FBI Agent James Howell and delivered them to him at one-thirty p.m. on June 22, 1969. That is what his evidence for the State tends to show, what it does show is for you the jury to say and determine.

With that the State called to the stand James Howell, who identified himself as being with the FBI and the court found him to be an expert in the field of fingerprint identification. He gave evidence tending to show that he saw John Kirkland that brought him these hands. That after some two and a half hours of investigation he got legible fingerprints. That he searched his files and compared them with the fingerprints of a man named Angelo Salvatore Pennisi, this being from the United States Army records, and he showed these prints to you or photographs of the two fingerprints, and he came to the conclusion that these fingerprints from the two hands were the same ones that he had in his files of Angelo Pennisi. That is what the evidence for the witness tends to show, what it does show is for you the jury to say and determine.

With that they called to the stand Mrs. Montrose Pennisi and identified her as the deceased's widow. That she was living with her husband at the time in question on Wilton Drive. That June 15th, was a Sunday. That she and her husband went to church; after church they went to the Hilton Inn for dinner and at the dinner that her husband went to the buffet table as the Court recalls it, and ate some food that had corn in it. And that it rained a lot that day. They went home and stayed home until about seven o'clock. At about six o'clock Maurice Miller came

to see him and had a conversation with her husband and discussed with him his travel plans.

[That her husband told her before he left that night that he was going to Wilmington, Delaware, with the defendant Vestal in connection with an investment with a man named Hatzis, that he would be back on Monday, June 16, 1969.]

EXCEPTION NO. 288

That he left with a shaving kit and that it was raining and that after he got out that he came back and got his raincoat. That her husband on this occasion had a new suit and a gold shirt and a striped tie. That he did not come back. That that was the last time that she saw him. That later it was reported to the police, as the Court recalls it was about Wednesday of that week. That she went to the police headquarters Wednesday afternoon. She identified State's Exhibit "8" as being the belt of her husband, size thirty-eight. That he had two belts exactly alike, size thirty-eight, and this was the one he had at home. She identified State's Exhibit "9", another belt, which she gave evidence tending to show was like the belt that her husband was wearing, this being size thirty-eight, showing the belt broken. She knew the defendant Vestal and had known him some twenty-two or twenty-three years. That he was a business associate of her husband's, that she was familiar with his signature and was shown State's Exhibit "10" and "11"; the first being a note for seventy thousand dollars and the second being a note for forty thousand, eight hundred and seventy-nine dollars and thirty-seven cents, and she said that she got the two notes from Mr. Lewis, a neighbor. These were offered into evidence and she iden-

tified State's Exhibit "12" as the shoes of her husband, that he had on when he left there and she identified "13" and "14" as being the pants and coat of her husband when he left. These were offered into evidence.

The witness was taken on cross examination by the counsel for the defendant, and she gave further evidence tending to show that her husband was from the State of New York and that he had no business in Wilmington, Delaware, but was Chairman of the Board of a company called Associated Traffic Clubs, an insurance company in Delaware. That he knew a man named Thomas Hatzis. That he had a bank account in Wilmington. That she could draw on that account and so could Lewis. That she had a financial interest in the outcome of this case. That she was a co-executor of the estate with the bank. She was asked about a deed marked for identification as Defendant's Exhibit "1" and said that she never saw it and was asked about another deed and said that she did not know anything about it. That her husband had some property at Myrtle Beach and was asked about State's Exhibit "3" and she gave further evidence tending to show that she filed a suit against the Southern Life Insurance Company and signed the complaint and that among other things she alleged that her husband came to his death by accidental means after external injuries and other things alleged in the complaint that you will recall. She identified Defendant's Exhibit "4" as the lawsuit, a complaint, in which she brought a lawsuit against Vestal and Hatzis for two million. two hundred thousand dollars. for the wrongful death of her husband. That is what some

of the evidence tends to show, what it does show is for you the jury to say and determine.

With that they called to the witness stand Dr. Chapman, who identified himself as presently the chief medical examiner of the State of Oklahoma, and he further gave evidence tending to show that he was formerly the associate medical examiner for the State of Virginia. And it was determined that he was a medical expert specializing in the field of pathology. Further evidence tending to show that he received the remains of the body on June 21, 1969. And he described the clothing. He described the shoes, pants, and coat. He gave evidence tending to show that one tooth on the zipper was missing and also some red stains on the pants and gave further evidence tending to show that the body was wrapped in draperies and saw drapery hooks there and saw log chains about the body and also about the legs. He identified the shoes and identified Exhibits "12", "13", and "14" and identified the drapery, State's Exhibit "15', and identified the chains, "16" through "19". He gave evidence tending to show that he turned these items over to Captain Jackson of the Greensboro Police Department. He gave further evidence tending to show the deceased weighed two hundred and five pounds and was seventy-one and one half inches long. That his hair was gray-black. That he took a speciman from the hair. That he found injuries to the face and head. Contusions and lacerations, which he described that he found a laceration to be three inches by one and a half. Another laceration and skull fracture on the left side. Other skull fractures and other lacerations which you will

recall. He found four parallel groves of the skull which he described. That the brain was soupy and there was a hemorrhage in the brain and that he removed the hands and turned them over to Kirkland for delivery to Washington for identification. He identified State's Exhibit "26", as being the picture of the skull which the Court allowed in the evidence for illustration as you will recall, and he removed some head hairs and placed them in an envelope, marked State's Exhibit "29", and gave them to Captain Jackson. He found in the body partly digested kernels of corn. The cause of the defendant's death was traumatic head injuries. Corn in the stomach should under normal conditions pass out of the stomach in about six hours, but under certain conditions that it did not happen. In his opinion the date of death was four to eight days prior to the day of this but in his opinion it was six days before, this being June the 21st, when he made that determination.

The witness was taken on cross examination by the counsel for the defendant and gave evidence tending to show that it was possible that he could have been dead four days. That his injury would have been from a hammer and the ridges could have come from a pipe and he found no belt in the pants. That is what the evidence of the witness tends to show, what it does show is for you the jury to say and determine.

With that they called to the stand Mrs. Emily Clapp, who identified herself as living in Greensboro, and gave evidence tending to show on Sunday, June 15, 1969, there was a lot of rain in Greens-

boro, and that on this date she was parked near the Vestal Florist place sometime before eight p.m., and on this occasion she saw Angelo Pennisi go toward them walking briskly and she knew him and he stopped in front of the door to the Vestal Florist and looked in and someone hollered at him from the street, and he turned and waved and that was all that she gave evidence tending to show. That she is related to Mrs. Pennisi. That she looked at him only for a moment, that the florist place was closed. That she did not see a man named Rierson.

Her husband took the stand and further gave evidence tending to show that he saw Mr. Pennisi at the time and place mentioned.

Next they called Otto Rierson, and he gave evidence tending to show that he had known Mr. Pennisi since 1951. That he was riding out there about this time and that he rode by and saw him standing there at the corner of Edmond's Drug Store, that there were three fire trucks in the area at the time. The prior witness gave evidence that tends to show these fire trucks present and his wife came to the stand and gave evidence that she also saw Pennisi there at that place and saw her husband wave at him. That is what some of the evidence for this witness tends to show, what it does show is for you the jury to say and determine.

With that they called to the stand Dewey Fuller, who identified himself as being with the fire department. He gave evidence tending to show that on this date that he got a call at seven fifty-five a.m. to go to a place two and one-half blocks from Summit Avenue.

ATTORNEY CAHOON: You said a.m. and you meant p.m.

COURT: I did, I am sorry.—seven fifty-five p.m. and that they got there in about three minutes, that there was a big rain that day. That is what the evidence for the State tends to show, what it does show is for you the jury to say and determine.

With that they called to the stand Maurice Miller, who identified himself as knowing Pennisi, and was a business associate. That on June the 15th, he saw him about six o'clock, that he went to his house after making a phone call and stayed there fifteen or twenty minutes. He was there for the purpose of getting a note that had been renewed, signed, and that this transaction was completed and that he had a conversation with Pennisi about his travel plans and he was told that he was going to Wilmington, Delaware with Vestal and was coming back Monday night, and he asked this witness to meet him at the airport and told him that he would call when he got there and to pick him up and he did not see him alive after that.

He was taken on cross examination by the counsel for the defendant and he gave further evidence tending to show that he went home after that, went to the Jung's Chinese Restaurant and ate supper, later went to the Quik Burger place he operated, that he did not change any clothes, was not muddy or dirty. That he owned property at Myrtle Beach and his property stock came from Vestal in some business venture. That he was familiar with some check that Vestal had given to—That Pennisi gave Vestal, excuse me, for sixteen thousand dollars and

it showed on the check that there was a balance of four thousand dollars. That is what the evidence for this witness tends to show, what it does show is for you the jury to say and determine.

With that the State called to the stand Kenneth Lewis, who identified himself as a friend of Pennisi. That on June the 18th, he went to the airport looking for the Pennisi car; at the airport he found the car parked there. That it was a 1966 model Cutlass Oldsmobile, dark color. That he brought it back and that he went to the police station to report Pennisi as missing. He identified two photographs, State's Exhibits "10"' and "11", as two notes in the amount of seventy thousand dollars and approximately forty thousand dollars. These notes were in his possession, entrusted to him by Pennisi. That he turned them over to Mrs. Pennisi shortly thereafter. These notes being dated June of 1968, and August of 1968.

ATTORNEY CAHOON: January, Your Honor.

COURT: Excuse me, you are correct. I am a poor writer. January of 1968, and August of 1968. That is what the evidence of this witness tends to show, and what it does show is for you the jury to say and determine. Thereupon State's Exhibits "10" and "11" were offered into evidence.

Thereupon the State called to the witness stand Roscoe Williard Gray, who identified himself as a parking lot attendant and that on this night in question, that is to say June 15, 1969, that he was there on duty. That about ten minutes to twelve that he saw a car coming from the direction of Greensboro.

That it drove into the parking lot and he took out a towel, wiped off the steering wheel and handle with the towel and that he stepped out of the booth from where he was and hollered at him and the man walked away and got to about fifteen feet of him, and the man started back to the car and kept on walking and the man walked away from the Gulf Station and he did not see him any more. Later it was determined it was Pennisi's car.

On cross examination he gave further evidence tending to show that this man was about five feet, ten inches tall, and was a dark complexioned foreign looking man. That is what the evidence for the State tends to show, what it does show is for you the jury to say and determine.

With that they called to the stand Alfred Frick, who identified himself as a parking lot attendant and he gave evidence tending to show that he was out there working on the before twelve shift, that the previous witness was there to relieve him. That he heard the other witness say there was something funny about this man, that he looked out there and saw a man with a towel around his neck, no hat on, and he was a dark skinned man but he was not a black man. And he was not the defendant. That is what the evidence from this witness tends to show for the State and the defendant, what it does show is for you the jury to say and determine.

With that they called to the stand Alma Thompson, who identified herself as the office manager of Summit Shopping Center, and she identified a lease marked State's Exhibit "30", as being a lease between the shopping center and the defendant

Vestal and his wife. This being a lease from 1966, to 1971, to the warehouse building. That is what the evidence for this witness tends to show, what it does show is for you the jury to say and determine.

With that the State called to the stand Sergeant Don Jenkins, who identified himself as being with the Greensboro Police and he is assigned to what is called the tactical unit. That he was with this police in June of 1969, that he was involved to some extent in this case. That on June 9, 1969, that he had a missing person's report and as a result of that he came to the defendant Vestal at the King's Inn. That at that time he did not know that Pennisi was dead. That on this occasion the defendant Vestal told him, this being about seven-forty p.m., that Pennisi wanted him to go with him to New York about some matter about his father and mother. That he had gone to Myrtle Beach over the weekend and had gotten back this night, Sunday night the 15th of June, and that Pennisi called him between seven to seven-thirty p.m. that night. When he stepped out of the house that Pennisi was parked there in front of his residence and it was raining, and that Pennisi told him that his mother and father were having some trouble and wanted him to go with him to New York, and Pennisi wanted six thousand dollars that Vestal, that he said that Vestal owed him and that he was upset about it. This having to do with something about a Lincoln automobile. That Pennisi left about eight o'clock that night, and he had not seen him since and he further told the officer as the evidence tends to show, that Pennisi could be anywhere and that he was not too concerned about him at that time. That he thought

that he would show up and told him who his lawyers were and told him about the six thousand dollars and also told him that he would get the money, that he would borrow the money from somebody even if he had to get it from Thomas Hatzis. Vestal gave further evidence tending to show on this occasion that he had Myrtle Beach property, that he had cut Pennisi in on a motel down there or somewhere. That he had bought the King's Inn in Greensboro. That in his judgment Pennisi could always get money. That Pennisi cut more off the top than he, Vestal, did.

On cross examination he gave further evidence tending to show that the defendant Vestal talked freely on this occasion. That is what the evidence of this witness tends to show, for both the State and the defendant, what it does show is for you the jury to say and determine.

And with that the State called to the stand T. A. McClain, who identified he was a police officer in Greensboro in June of 1969, that he was involved in the investigation and that he went to the Vestal warehouse at Bessemer Avenue at one p.m., on June 2, 1969, that Art Lee of the FBI went with him, and they went to the parking lot where there were some weeds and in looking around there they saw an object, a broken belt. It was a belt, size thirty-eight, which was identified as State's Exhibit "9", and that later he went to the Pennisi residence to see if he could find anything like it. That the belt was in the weeds ten feet from the rear door of the Vestal warehouse.

The witness was taken on cross examination and

gave further evidence tending to show that he did not know who made the request, that they were checking on a bomb threat in the area. That is what the evidence of this witness tends to show, for the State and the defendant, what it does show is for you the jury to say and determine.

With that the State called to the stand Mrs. Ethel Emerson, who gave evidence that tends to show that about that time, that in June of 1969, that she was staying in the King's Inn. That on this afternoon that she went to ride around over town to various places that she told you about. That she had known the defendant Vestal for a year, that she was waiting for Vestal to get back from the beach. That about seven o'clock she rode by the residence of Vestal and saw him and his son, Sonny, getting out of the white Cadillac, it being an Eldorado, a 1969, Cadillac. Later on she rode back by the place again and she did not know what time, it was getting dark, and she found the car that she had seen before gone. Then she, sometime later she went to the Casey Barbecue place and called Vestal and wanted him to pick her up. There was some discussion about this and he suggested that he would send a Negro man, a black man named Donald Simmons, and she said not to do that. At any rate, as a result of the conversation the defandant Vestal came to pick her up at eleven o'clock and she rode back with them to King's Inn in the back seat of the car, that she did not keep up with the time, it had rained a lot that day. That is what the evidence for this witness tends to show, what it does show is for you the jury to say and determine.

With that the State called to the stand Robert Stanley, Jr., who identified himself as being in the insurance business. That on June the 15th, there had been a big rain, that he was driving around and saw some fire trucks there in the vicinity of Bessemer Avenue. There in the vicinity of Summit Shopping Center. Near the Edmond's Drug Store he saw a white 1969 Eldorado Cadillac, with a white interior and it was not occupied. He was shown State's Exhibit "31" and "32" and "33", and gave evidence tending to show it looked like that vevehicle. He was cross examined and gave further evidence tending to show that he had seen different white Cadillacs before. That he told Mr. Gibson about it and his mother also saw a white Cadillac. That is what the evidence of this witness tends to show, what it does show is for you the jury to say and determine.

Thereupon the State called to the stand Betty Stanley, who identified herself, that she was in the area of Bessemer and East Lindsey on this occasion. There were fire trucks going by and she saw smoke and saw a car that looked like the picture shown on State's Exhibits "31", "32", and "33", and she saw four people in the Cadillac and saw one man in there who looked straight at her when he went by. He had short curly hair and he had a worried look on his face. Two in the front and two in the back. Later she saw the vehicle again after June 15, with Lt. Gibson on U. S. 220, and told him that it was the car.

On cross examination she gave further evidence tending to show that she did not know a Cadillac

from a Buick. That is what the evidence from this witness tends to show for the State and the defendant, what it does show is for you the jury to say and determine.

With that the State called to the stand Lt. Gibson, who gave evidence tending to show he was with the Greensboro Police Department, that he had seen Mrs. Stanley August 1, 1969, and that she on this occasion was with him and he was present when she said that is the car. That the car at the time was occupied by one Clarence Shropshire, that he pulled the car off the road, and he identified it as being the car identified by the photographs, "31", "32", and "33". That he was investigating this case for quite a while. That he must have talked to five hundred to thousand witnesses and that is what the evidence of this witness tends to show, what it does show is for you the jury to say and determine.

With that they called to the stand Captain Jackson, who identified himself as a commanding officer of the Detective Division, that he went to the Vestal warehouse the latter part of June after Vestal had been to his office concerned about the safety of his children. That Vestal consented for him and others to go to his warehouse. And that Vestal unlocked the door and he went in and looked around and he described what he saw there and among other things he said that he saw draperies which he identified as three gold drapes, later identified as State's Exhibits "36", "37" and "38", which he took with the consent of Mr. Vestal, a paperwriting. State's Exhibit "39" being offered into evi-

dence in that regard. The witness further gave evidence tending to show that at the time that Vestal came to his office that he appeared upset and concerned for his children. On one occasion he was crying and he described further things that he saw there. He gave further evidence tending to show he delivered these exhibits to the FBI, State's Exhibits "15", "36" and "37" and "38", and delivered the chains and delivered the clothing and that he delivered State's Exhibit "29" to the FBI, being the hair given him by Dr. Chapman. Later he went to the warehouse with a search warrant on July the 18th. On that occasion he saw a number of things which he described to you, blood on various places on the wall and on the ceiling and he described other places where he saw what appeared to be hairs. You will recall about that. All of these things were taken into custody and later were delivered to the FBI. He was cross examined about June the 28th, and stated that Vestal did ask for protection and on July the 18th, that the defendant was congenial, that Attorney Cahoon was nice there, too. He was asked about Exhibit "40", the drapes, which he said were taken on the July occasion and were found at approximately the same place as the others. That is what the evidence for this witness tends to show, what it does show is for you the jury to say and determine.

With that they called to the stand Mrs. Rebecca Wyrick Leigh, who identified herself as formerly of Greensboro and one time from Alaska, that when she left from Greensboro she left some draperies and other things with Mr. Vestal to keep for her. And she identified the four smaller draperies and

the one larger one as looking like the ones that she left with him.

With that they called to the stand Gwendolyn Gail Hoyle, who identified herself as being from Myrtle Beach, that she bought a white Eldorado Cadillac automobile for the defendant. That it came from money that had come from some sale, some business transaction, and she arranged for it. She bought this and kept the vehicle four days, and it was titled to her first and was later transferred to the defendant Vestal. That it belonged to Vestal, in fact. That she delivered it to him four days after she got it.

With that they called to the stand Lloyd Tyler, that identified himself as being with the motor company that sold the Cadillac to her and he serviced it and found no odor in the trunk, no blood and no hair.

Jerry Alley, who identified himself as being with the Galloway Motors, identified himself, and said that he inspected the vehicle and Mr. Amos said that he was present and remembers the defendant bringing the car in for an inspection. That is what the evidence for these witnesses tends to show for the State and the defendant, what it does show is for you the jury to say and determine.

With that they called to the stand Robert Kilby, who identified himself as being with Black Cadillac-Oldsmobile in Greensboro, and he recalls the defendant coming in on June 13, to get a warranty in his name and paying him for it.

With that the State called to the stand John Ozlin, who identified himself as being in the tire business

and that in 1969, he had a business in South Hill, Virginia, living in a place called Bugg's Island, and driving to Bugg's Island from South Hill, Virginia, he had to cross the steel bridge on U. S. 1. That about the middle of June 1969, in the morning, about seven o'clock in the morning he observed parked there in the area of the bridge a white Cadillac automobile. He identified the vehicle as looking like State's Exhibit "31" and "32" and "33". He was cross examined and he gave evidence tending to show that the date could have been anywhere from June the 10th to the 20th. That he did not look at the license plate and did not see the defendant there. That is what this evidence for this witness tends to show both for the State and the defendant, what it does show is for you the jury to say and determine.

With that they called to the stand Shirley Everage, who identified herself as working for the Pennisi Insurance Agency, and she gave evidence tending to show that on Monday, June 16, 1969, that she saw the defendant there in the office between ten and eleven o'clock in the morning and on this occasion she asked the defendant what are you doing here, I thought you were with Mr. Pennisi in Wilmington, Delaware, and that thereupon the defendant said, "sssh", I am supposed to be there, I did not go but don't tell Rose. Rose being identified as the wife of Mr. Pennisi. That he was there asking about an insurance certification of his automobile. That is what the evidence for this witness tends to show for the State and the defendant, what it does show is for you the jury to say and determine.

With that they called to the stand James T.

Churchwell, who identified himself as a friend of the defendant and he gave evidence tending to show that the defendant loaned him the Cadillac automobile and he used it for something like a week going to Mississippi and back and that he looked in the trunk, that there was an odor in the trunk but he could not describe what it was. That he did not put any blood or hair in the trunk. That is what his evidence tends to show for both the State and the defendant, what it does show is for you the jury to say and determine.

With that the State called to the stand Robert D. Lowe, who identified himself as a salesman and a church pastor. That he knew the defendant in June. That on July 18, 1969, that he purchased this Eldorado Cadillac from the defendant, that it was all white, and he paid a thousand and seventy-five dollars in cash and sent a check to the bank for six thousand, one hundred and twenty-four dollars and ninety-five cents for the balance. He identified two checks in that amount. That he did not keep the car long, and he did not smell anything unusual about it. He sold it to Clarence Shropshire. On cross examination he gave evidence tending to show he kept it nine days and had some fishing tackle in there and at one time had some horse saddles in there at one time, but that he did not put any human hair or blood in the car. That is what the evidence for this witness tends to show both for the State and the defendant, what it does show is for you the jury to say and determine.

Next, they called to the stand Wayne Pegram, who gave evidence tending to show that he was

with the Greensboro Police in 1969, but now with the SBI. He went to this warehouse with other officers on July the 18th, with a search warrant, with Captain Jackson and Lt. Gibson along. He identified the warehouse with a diagram for the purpose of illustrating, which the Court told you about, and he told what he saw there in the warehouse and gave evidence tending to show he found stains on the wall and hair on the wall and found items on the wall that looked like blood. Thereupon a number of exhibits were offered including the exhibits "44" through "56". That he delivered these to Captain Jackson and that he identified photographs "66" to "78" and these were fair and accurate and the Court instructed you about that. That is what the evidence for this witness tends to show both for the State and the defendant, what it does show is for you the jury to say and determine.

They called Clarence Shropshire to the stand and he gave evidence tending to show that he runs a restaurant there in Greensboro. That he bought this Cadillac in July of 1969 from Lowe. That it was a white Cadillac as shown, as it appeared in "31", "32" and "33" exhibits. That he had it about two hours before he was contacted by Lt. Gibson about it. That it had a strong odor of cleaning fluid in the trunk but that he did not see any blood or hair in it. That is what the evidence for this witness tends to show both for the State and the defendant, what it does show is for you the jury to say and determine.

With that they recalled Pegram to the stand. He identified photographs "79" through "82" of what he saw there in the warehouse and these were of-

fered for illustration, as the Court instructed you. That this vehicle was searched on July 28, 1969, four-thirty p.m. at the Circle Inn and that Shropshire had consented to the search and it was made and he told about what they did there in the search and he identified various objects, jack and sponge and carpet and other things that they took from this vehicle. That all of the items that they took had been transferred to Mr. Wallace of the FBI laboratory. That is what the evidence for this witness tends to show for the State and the defendant, what it does show is for you the jury to say and determine.

With that Captain Jackson was recalled and gave further evidence tending to show that he transferred Exhibits "44" to "57" to the FBI. That is what the evidence for this witness tends to show for the State and the defendant, what it does show is for you the jury to say and determine.

With that the State called to the stand Frederick Wallace, who identified himself as being an FBI agent and that he had been with them since 1963. He was found to be an expert in the field of hairs and fibers in identification and comparison and was shown State's Exhibit "15" as well as "36", "37" and "38" and "40", these being drapes, and that he examined them as to composition, size and design. He described for you the type that he found there. And he examined all of them, and he found that the fibers and the threads in State's Exhibit "15", matched "36" and "37" and "38" and "40", and found that the stitching matched and construction was similar. The only difference that he found

between them was that the size of one being somewhat larger than the others and this was the only difference that he found. And he turned the drapes over to Agent DeRonja. That he got State's Exhibit "29" in the registered mail from Greensboro police and that also was delivered to him State's Exhibit "44" from Captain Jackson and that he thereupon identified a number of exhibits as being hair of various kinds. And he found that the hair in all of the exhibits offered were microscopically matched with the hair of State's Exhibit "29", as you recall was the hair offered into evidence as being the hair removed from the head of Mr. Pennisi by Dr. Chapman. He described the hair that he found and the types of them and you will recall that testimony. He described the other exhibits as they were offered as exhibits taken from the automobile and he identified the various items including the hair taken from that and after he had finished with these exhibits that he turned them over to Agent McWright for further examination.

They then called to the stand Frank DeRonja, who identified himself as being, and the Court found him to be, an expert in the field of metallurgy. That is dealing with metals and he gave his background and told that he examined the hooks and the weights removed from the draperies and described them for you and he observed that the hooks were different sizes. One particular size was dominant and he observed marks on the hooks that were made by a machine and he observed three marks and found the marks on State's Exhibit "15", that being the hooks from that drapery the same as the marks on "36", "37", and "38". He compared the weights,

they were an unusual shape and he concluded that the weights came from the same source. And that is what his evidence tends to show for the State and the defendant, what it does show is for you the jury to say and determine.

With that Captain Jackson took the stand and he gave further evidence tending to show he transmitted State's Exhibit "29", being the head hair that Dr. Chapman delivered to him taken from the head of the deceased, by registered mail to the FBI.

With that they called to the stand Agent McWright, who identified himself as being with the FBI seventeen and a half years and described his qualifications, holding a Ph.D. in microbiology from George Washington and the Court found him to be an expert in the field of forensic serology. That he made an examination of these various exhibits turned over to him for blood and that he found on all of the exhibits which he referred to as being human blood. This being exhibits, some were taken from the warehouse and some from the automobile. That he could not put the blood in groups but there are four groups that he told you about but he could not classify it by groups. And he gave further testimony tending to show it was human blood and not fish blood and that he did not find any fish blood. That is what the evidence for this witness tends to show. That is what all of the evidence for the State tends to show, what it does show is for you the jury to say and determine.

The Court instructs you that before you could convict the defendant of murder in the second degree it will be essential that the State satisfy you

beyond a reasonable doubt that the defendant committed an act or acts which in natural probable sequence proximately caused the death of the deceased and that such act or acts was done with the intention to take the life of the deceased and that they were done with malice. The defendant's act or acts need not have been the only cause of the death of the deceased. It is sufficient if such act or acts concurred with some other cause by another or others acting at the same time in combination with such act or acts and caused the death of the deceased.

[And the Court further instructs you as to the lesser offense of manslaughter. In order for you to convict the defendant of manslaughter it would be essential that the State satisfy you beyond a reasonable doubt that the defendant committed an act or acts which in natural and probable sequence proximately caused the death of the deceased and that such act or acts was done with the intention to take the life of the deceased. And that the defendant's act or acts need not have been the only cause of the death of the deceased. It is sufficient that such act or acts concurred with some other cause by another or others acting at the same time in combination with such act or acts and caused the death of the deceased.]

EXCEPTION NO. 289

Now, ladies and gentlemen of the jury, the Court instructs you that in this case the State relies upon circumstantial evidence. Circumstantial evidence is evidence of facts and circumstances which surrounds and are connected with particular facts to

be proven and which taken together the Court and the jury may reasonably consider as proof or tending to prove or negate the ultimate facts sought to be established in the case before you. Circumstantial evidence may be of two kinds, consisting of a number of independent links, each depending upon the other, in which case it is said that each link must be complete within itself and that the resulting chain cannot be stronger than its weakest link. Or it may consist of a number of independent concurrences or circumstances all pointing in the same direction in which case individual circumstances may be compared to the strands of a rope where no one of them may be sufficient in itself but all together may be strong enough to prove the guilt of a defendant charged with a crime beyond a reasonable doubt or to establish his innocence or to raise in the minds of the jury a reasonable doubt as to his guilt, as the case may be. Our law says that circumstantial evidence is a recognized and accepted instrumentality in the ascertainment of the truth, and it is essential often times and when properly understood and applied it is highly satisfactory in matters of the greatest moment. The facts, the relations, connections in combination between the circumstances should be natural, clear and reasonable and satisfactory. When such evidence is relied upon to convict, it should be clear, convincing and concluding in all of its combinations, and it should exclude all reasonable doubt as to his guilt. In passing upon such evidence it is the duty of the jury to consider all of the circumstances relied upon to convict and determine whether they have been established beyond a reasonable doubt. If not so established, the

circumstances should be excluded from any further consideration and have no weight in reaching a verdict. For example, the State puts up a witness and undertakes to prove a circumstance. You will first determine in your mind is the circumstance established beyond a reasonable doubt. If you say that the circumstance has been so established beyond a reasonable doubt, you can take that into consideration in determining what your verdict will be and whether the State has satisfied the jury beyond a reasonable doubt as to the defendant's guilt. If you find that it has not been so established as the Court has told you, then it would be excluded from your consideration. After considering the evidence in this case and determining the circumstances which are established beyond a reasonable doubt, the next thing for the jury to determine is, do these circumstances exclude every other reasonable conclusion except that of guilt. If so, the evidence is sufficient to convict, otherwise, it is not.

The accepted rule of law is where the State relies for a verdict upon circumstantial evidence the facts established must be of such a nature and so related to each other as to point unerringly to the defendant's guilt and exclude every reasonable hypothesis of his innocence.

Now, members of the jury, the worthiness of belief of the witnesses in the case is a matter for you to determine. The weight, if any, you give to their testimony you shall determine. In doing this you may take into consideration the reasonableness or unreasonableness of the testimony of the witness. You may take into consideration his attitude or his

manner or his demeanor, his means of knowing the facts about which he testified, the interest he has in this lawsuit. His knowledge or lack of opportunity of knowing; or you may take into consideration, members of the jury, any other factors that may suggest itself to your good judgment and common sense in determining the worthiness of belief of a witness and the weight, if any, that you will give to their testimony. You may believe all a witness says or disbelieve all a witness says, or believe a part and disbelieve a part.

Now in this case, at the request of the defendant and his counsel, the Court charges you as follows: That the defendant did not take the witness stand in his own behalf. The Court charges you that in so doing the defendant is doing that which the law gave him a right to do, and the Court instructs you that you are not to consider this against the defendant at any stage in the trial or at any stage of your deliberation.

In this case the State says and contends that you should be satisfied and satisfied beyond a reasonable doubt and that you should convict the defendant of murder in the second degree
[or at least manslaughter.]

EXCEPTION NO. 290

On the other hand, the defendant says and contends that you should have a reasonable doubt about it, and you should give him the benefit of that doubt and acquit him.

The Court instructs you that in recapitulating the evidence the Court may have inadvertently left

something out. If it did, you rely on your own recollection about what the evidence is and don't take it from the judge, and don't take it from the lawyers, you take it like you remember it, like it was offered into evidence here in this courtroom. In this case the attorneys on each side have ably argued to you their contentions about it and you will take that into consideration in making up your verdict. You will also take into consideration any other legitimate contention that arises in your minds from the evidence in the case.

Now in this case, the defendant contends that he is entitled to instruction on the law of alibi and in that connection the Court charges you as follows: An alibi, meaning elsewhere, is not properly speaking a defense within the actual meaning of the word defense, but is a mere fact which may be used to call in question the identity of the person charged or the entire basis of the prosecution. The burden of proving an alibi does not rest upon the defendant. The burden of proof never rests upon the defendant to show his innocence or to disprove the fact necessary to establish the crime for which he is charged. The defendant's presence at and participation in the crime charged are affirmative material facts that the prosecution must show beyond a reasonable doubt to sustain a verdict. For the defendant to say that he is not there is not an affirmative proposition. It is a denial of the existence of a material fact in the case. Therefore, the defendant's evidence on an alibi is to be considered by you like any other evidence wherein the defendant tries to refute or disprove the evidence of the State. And if upon a consideration of all of the evidence in the

case including any evidence in respect to an alibi there arises in your minds a reasonable doubt about his guilt, then it would be your duty to give him the benefit of that doubt and acquit him.

Now, this is not a question of sympathy for anybody. It is not a question of prejudice against anybody. You are sworn jurors and you have a duty to perform. That duty is to take the evidence from the witnesses, that duty is to take the law from the Court and that duty is to let your verdict speak the truth. The word "verdict" literally translated from the Latin means to speak the truth, and you will let your verdict so do in this case.

Now in this case this Court has no opinion about what your verdict should be. The law in this State in its wisdom does not permit this Court to express an opinion about this case. If perchance in the course of the trial of this case or this charge, the Court may have inadvertently expressed an opinion, disregard that. This Court did not intend so to do.

So the Court charges you as follows: As to the charge of murder in the second degree, if the State has satisfied you beyond a reasonable doubt that the defendant committed an act or acts which in natural and probable sequence proximately caused the death of the deceased and that such act or acts were done with the intention to take Pennisi's life and that they were done with malice, it would be your duty to convict the defendant of murder in the second degree. If you fail to so find, it will be your duty to find him not guilty of this or if after a fair and impartial consideration of all of the facts and

circumstances in the case you have a reasonable doubt about his guilt, then you would give him the benefit of the doubt and acquit him.

[If you find him not guilty of murder in the second degree, you will then come to consider the lesser offense of manslaughter about which the Court has previously instructed you, and as to that the Court charges you that if you find from the evidence and beyond a reasonable doubt that the defendant committed an act or acts which in a natural and probable sequence proximately caused the death of the deceased and that such act or acts were done with the intention to take Pennisi's life and that this was done by anger suddenly aroused and before sufficient time had lapsed for passion to subside and reason to resume its habitual control, then the defendant would be guilty of manslaughter and if you so find beyond a reasonable doubt, it would be your duty to return a verdict of guilty of manslaughter.]

EXCEPTION NO. 291

If you fail to so find it would be your duty to return a verdict of not guilty, or if upon a fair and impartial consideration of all of the evidence and circumstances in the case you have a reasonable doubt about the defendant's guilt, you have a duty to give him the benefit of that doubt and to acquit him.

Are there any further contentions at this time from either side?

SOLICITOR ALBRIGHT: None from the State, Your Honor.

COURT: Now a verdict does not become a ver-

dict unless and until it is unanimous, that is to say that all twelve of the jurors that go to the jury room must agree in order to bring in a lawful verdict. All twelve. When you go to your room select one of your number as foreman to preside over your deliberation. The Court out of an abundance of precaution, the Court will not send you to your room to deliberate now, because it is about one p.m. and in just a few moments we are going to take a recess until two o'clock. All fourteen of you come back to the box. At that time the Court will excuse the alternate jurors, but I will not excuse them until that time.

Now during the Noon hour do not talk about this case. Don't let anybody talk to you about this case. If anybody tries to talk to you, tell them that you are on the jury. If they persist find out who they are and tell me about it. Don't listen to any news or read any newspapers or listen to any radio accounts of this case. Keep your minds open about this case until you come back here and retire to your room to deliberate your verdict.

After lunch jury returned to open court.

COURT: (to jury) At this time the Court will excuse the thirteenth and fourteenth alternate jurors with the thanks of the Court. We appreciate your services. Your services could have been needed at any time but fortunately it was not called for, and so at this time you may be excused. As to the jury of twelve, you may now retire to your room and deliberate on your verdict. When you arrive at your verdict you may knock on the door and return to the courtroom proper.

ASSIGNMENT OF ERROR NO. 1 AND NO. II AS TO REFUSAL TO SUPPRESS EVIDENCE, SECOND TRIAL

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

The defendant groups his exceptions and assigns as error the acts and omissions of the Trial Court listed below, each separately numbered paragraph being a separate assignment of error, the defendant appellant contending in each instance that the Trial Court erred to his prejudice in the particular recited:

I. In overruling defendant's motion to suppress evidence found, seized and obtained on July 18, 1969, under and pursuant to a search warrant for the search of the defendant's warehouse as shown by EXCEPTION NO. 1 (R p 9), and in admitting in evidence over the defendant's objections, and continuing objection to that line of testimony and evidence, evidence which was seized, discovered, found and obtained pursuant to a search under that search warrant, and as the fruit thereof, as shown by the following exceptions(notes are added for the Court's convenience indicating nature of evidence involved in each exception):

1 (R pp 8-9) Motion to suppress evidence, fruits of search under search warrant, July 18, 1969.

56 (R p 96) Search of July 18, 1969, under search warrant.

57 (R p 97) Search of July 18, 1969, under search warrant, description of premises searched and objects found, blood spots, hair, photographs taken,

yellow-gold drapery (Exhibit 40).

58 (R p 99) Exhibit 40, yellow-gold drapery with hooks and weights, search of July 18, 1969.

59 (R p 99) Exhibit 40, yellow-gold drapery with hooks and weights, search of July 18, 1969.

60 (R p 99) Exhibit 40, yellow-gold drapery with hooks and weights, search of July 18, 1969.

61 (R p 99) Exhibit 40, yellow-gold drapery with hooks and weights, search of July 18, 1969.

62 (R p 99) hair, wood chips with blood, hair, search of July 18, 1969.

63 (R p 101) Exhibit 40, yellow-gold drape, search of July 18, 1969.

69 (R pp 103-4) Exhibit 40, yellow-gold drape, search of July 18, 1969.

71 (R p 104) Exhibit 40, yellow-gold drape, search of July 18, 1969.

83 (R p 120) Search and description of warehouse contents on July 18, 1969.

84 (R p 121) Diagram of warehouse, showing search on July 18, 1969.

85 (R p 121) Diagram of warehouse, showing search on July 18, 1969.

86 (R pp 121-2) Search and items found on July 18, 1969, search.

87 (Rp 122) Search and items found on July 18, 1969, search.

88 (R p 122) Search and items found on July 18, 1969, search.

89 (R p 122) Search of July 18, 1969, blood stains, hair, Exhibit 44.

90 (R pp 123-4) Search of July 18, 1969, blood

stains, hair, Exhibit 44.

91 (R p 124) Search of July 18, 1969, blood stains, hair, Exhibit 44.

92 (R p 124) Search of July 18, 1969, hair in pill box, Exhibit 45.

93 (R p 124) Search of July 18, 1969, hair in pill box, Exhibit 45.

94 (R p 124) Search of July 18, 1969, hair in container.

96 (R p 125) Search of July 18, 1969, hair in container.

97 (R p 125) Search of July 18, 1969, hair in container.

99 (R pp 125-6) Search of July 18, 1969, hair in containers, Exhibits 44, 45, 46, 47.

100 (R p 126) Search of July 18, 1969, hair in containers, Exhibit 48.

101 (R p 126) Search of July 18, 1969, wood chip, blood in container, Exhibit 50.

102 (R p 126) Search of July 18, 1969, description of search and findings.

103 (R p 127) Search of July 18, 1969, description of search and findings.

104 (R p 127) Search of July 18, 1969, wood chip and blood, Exhibit 50.

105 (R p 127) Search of July 18, 1969, wood chip and blood, Exhibit 51.

106 (R p 127) Search of July 18, 1969, description of search and findings.

107 (R p 128) Search of July 18, 1969, sheetrock paper, blood, Exhibit 52.

108 (R p 128) Search of July 18, 1969, sheetrock

paper, blood, Exhibit 52.

109 (R p 128) Search of July 18, 1969, another sheetrock paper, blood.

110 (R p 128) Search of July 18, 1969, portions of wall, blood, hair, Exhibits 54, 55, 56.

111 (R p 129) Search of July 18, 1969, parts of wall, blood, hair, Exhibits 54, 55, 56.

112 (R p 129) Search of July 18, 1969, parts of wall, blood, hair, Exhibits 54, 55, 56.

113 (R p 129) Search of July 18, 1969, parts of wall, blood, hair.

114 (R p 129) Search of July 18, 1969, parts of wall, blood, hair.

115 (R p 130) Search of July 18, 1969, photograph inside warehouse, Exhibit 66.

116 (R p 130) Search of July 18, 1969, photograph inside warehouse, Exhibit 66.

117 (R p 130) Search of July 18, 1969, photograph inside warehouse, Exhibit 67.

118 (R pp 130-131) Search of July 18, 1969, photograph inside warehouse, Exhibit 68.

119 (R p 131) Search of July 18, 1969, photograph inside warehouse, Exhibit 68.

120 (R p 131) Search of July 18, 1969, photograph inside warehouse, Exhibit 69.

121 (R p 131) Search of July 18, 1969, photograph inside warehouse, Exhibit 69.

122 (R p 131) Search of July 18, 1969, photograph inside warehouse, Exhibit 70.

123 (R p 132) Search of July 18, 1969, photograph inside warehouse, Exhibit 70.

124 (R p 132) Search of July 18, 1969, photograph

inside warehouse, Exhibit 71.

125 (R p 132) Search of July 18, 1969, photograph inside warehouse, Exhibit 71.

126 (R p 132) Search of July 18, 1969, photograph inside warehouse, Exhibit 72.

127 (R p 132) Search of July 18, 1969, photograph inside warehouse, Exhibit 72.

128 (R p 132) Search of July 18, 1969, photograph inside warehouse, Exhibit 73.

129 (R p 133) Search of July 18, 1969, photograph inside warehouse, Exhibit 73.

130 (R p 133) Search of July 18, 1969, photograph inside warehouse, Exhibit 73.

131 (R p 133) Search of July 18, 1969, photograph inside warehouse, Exhibit 74.

132 (R p 133) Search of July 18, 1969, photograph inside warehouse, Exhibit 74.

133 (R p 133) Search of July 18, 1969, photograph inside warehouse, Exhibit 75.

135 (R p 134) Search of July 18, 1969, photograph inside warehouse, Exhibit 76.

136 (R p 134) Search of July 18, 1969, photograph inside warehouse, Exhibit 77.

137 (R pp 134-135) Search of July 18, 1969, photograph inside warehouse, Exhibit 77.

138 (R p 135) Search of July 18, 1969, photograph inside warehouse, Exhibit 78.

139 (R p 135) Search of July 18, 1969, photograph inside warehouse, Exhibit 78.

140 (R p 135) Search of July 18, 1969, warehouse photographs, 66 through 78.

141 (R p 136) Search of July 18, 1969, warehouse

photographs, 66 through 78.

142 (R p 137) Search of July 18, 1969, photograph inside warehouse, Exhibit 79.

143 (R p 137) Search of July 18, 1969, photograph inside warehouse, Exhibit 79.

144 (R p 138) Search of July 18, 1969, photograph inside warehouse, Exhibit 80.

145 (R p 138) Search of July 18, 1969, photograph inside warehouse, Exhibit 80.

146 (R p 138) Search of July 18, 1969, photograph inside warehouse, Exhibit 80.

147 (R p 138) Search of July 18, 1969, photographs inside warehouse, stains, Exhibit 81.

148 (R p 138) Search of July 18, 1969, photographs inside warehouse, stains, Exhibit 81.

149 (R p 138) Search of July 18, 1969, photographs inside warehouse, stains, Exhibit 81.

150 (R p 139) Search of July 18, 1969, photographs inside warehouse, hair, Exhibit 82.

151 (R p 139) Search of July 18, 1969, photographs inside warehouse, hair, Exhibit 82.

152 (R p 139) Search of July 18, 1969, photographs inside warehouse, Exhibits 79, 80, 81, 82.

153 (R p 139) Search of July 18, 1969, photographs inside warehouse, Exhibits 79, 80, 81, 82.

154 (R p 139) Search of July 18, 1969, photographs inside warehouse, Exhibits 79, 80, 81, 82.

174 (R p 147) Search of July 18, 1969, drape taken, Exhibit 40.

175 (R p 147) Search of July 18, 1969, drape taken, Exhibit 40.

176 (R p 148) Search of July 18, 1969, drape

taken, Exhibit 40, tests.

177 (R p 148) Search of July 18, 1969, drape taken, Exhibit 40, findings.

178 (R p 150) Search of July 18, 1969, drape taken, Exhibit 40.

179 (R p 150) Search of July 18, 1969, drape taken, Exhibit 40.

184 (R p 151) Search of July 18, 1969, hair, blood, Exhibit 44.

185 (R p 151) Search of July 18, 1969, hair, blood, Exhibit 44.

186 (R p 151) Search of July 18, 1969, hair, blood, Exhibit 44.

187 (R p 151) Search of July 18, 1969, hair, blood, Exhibit 44.

188 (R p 152) Search of July 18, 1969, hair, blood, Exhibit 44.

189 (R p 152) Search of July 18, 1969, hair, blood, Exhibit 44.

190 (R p 152) Search of July 18, 1969, hair, blood, Exhibit 44, compare with Exhibit 29, hair from corpse.

191 (R p 152) Search of July 18, 1969, compare hair, Exhibits 44 and 29 from corpse.

192 (R p 154) Search of July 18, 1969, hair taken, Exhibit 45.

193 (R p 154) Search of July 18, 1969, hair taken, Exhibit 45.

194 (R p 155) Search of July 18, 1969, hair taken, Exhibit 46.

195 (R p 155) Search of July 18, 1969, hair taken, Exhibit 46.

196 (R p 155) Search of July 18, 1969, hair taken, Exhibit 46.

197 (R p 155) Search of July 18, 1969, hair taken, Exhibit 46.

198 (R p 155) Search of July 18, 1969, hair taken, Exhibit 46, compare with Exhibit 29, hair from corpse.

199 (R p 156) Search of July 18, 1969, hair taken, Exhibit 47.

200 (R p 156) Search of July 18, 1969, hair taken, Exhibit 47, compare with hair from corpse, Exhibit 29.

201 (R p 157) Search of July 18, 1969, hair taken, Exhibits 48, 49.

202 (R p 157) Search of July 18, 1969, hair taken, Exhibits 48, 49, compare with hair from corpse, Exhibit 29.

203 (R p 158) Search of July 18, 1969, sheetrock, blood, hair, Exhibit 52.

204 (R p 158) Search of July 18, 1969, part of wall, hair, Exhibit 55.

205 (R p 158) Search of July 18, 1969, part of wall, hair, Exhibit 55.

206 (R p 159) Search of July 18, 1969, part of wall, hair, Exhibit 55, compare with hair from corpse, Exhibit 29.

207 (R p 159) Search of July 18, 1969, sheetrock, blood, hair, Exhibit 55, compare with hair from corpse, Exhibit 29.

208 (R p 159) Search of July 18, 1969, part of wall, hair.

209 (R p 159) Search of July 18, 1969, part of

wall, hair, compare with State's Exhibit 29, hair from corpse.

215 (R p 162) Search of July 18, 1969, wood chips, blood, Exhibits 50, 51.

216 (R p 162) Search of July 18, 1969, sheetrock, blood, Exhibit 53.

217 (R p 162) Search of July 18, 1969, sheetrock, blood, Exhibit 52.

218 (R p 163) Search of July 18, 1969, parts of wall, hair, blood, Exhibits 54, 55, 56.

219 (R p 163) Search of July 18, 1969, parts of wall, hair, blood, Exhibits 54, 55, 56.

220 (R p 163) Search of July 18, 1969, parts of wall, hair, blood, Exhibits 54, 55, 56.

221 (R p 163) Search of July 18, 1969, wood chips, blood, Exhibit 57.

256 (R p 174) Search of July 18, 1969, wood chips, blood, Exhibit 50.

257 (R p 175) Search of July 18, 1969, wood chips, blood, Exhibit 50.

258 (R p 175) Search of July 18, 1969, wood chips, blood.

259 (R p 175) Search of July 18, 1969, wood chips, blood, Exhibit 51.

260 (R p 175) Search of July 18, 1969, sheetrock, blood, Exhibit 52.

261 (R p 176) Search of July 18, 1969, sheetrock, blood, Exhibit 52.

262 (R p 176) Search of July 18, 1969, sheetrock, blood, Exhibit 53.

263 (R p 176) Search of July 18, 1969, parts of wall, blood, Exhibits 54, 55, 56.

264 (R p 176) Search of July 18, 1969, parts of wall, blood, Exhibits 54, 55, 56.

265 (R p 177) Search of July 18, 1969, parts of wall, blood, Exhibit 57.

275 (R p 177) State offers all exhibits as a group.

II. In overruling defendant's motion to suppress evidence found, seized and obtained in the search of defandant's warehouse without a search warrant on June 28, 1969, as shown by EXCEPTION NO. 2 (R pp 9-10), and in admitting in evidence over the defendant's objections and continuing objection to that line of testimony and evidence, evidence which was seized, discovered, found and obtained pursuant to that search and as the fruit thereof as shown by the following exceptions (notes are added for the convenience of the Court showing nature of evidence involved in each exception):

2 (R pp 9-10) Motion to suppress evidence.

46A (R pp 87-90) Motion to suppress evidence, Court's findings and conclusion.

47 (R p 92) Search of June 28, 1969, observations made.

48 (R p 93) Search of June 28, 1969, Exhibit 36, a drape taken.

49 (R p 93) Search of June 28, 1969, Exhibit 36, a drape taken.

50 (R pp 93-94) Search of June 28, 1969, Exhibit 36, a drape taken.

51 (R p 94) Search of June 28, 1969, Exhibit 37, a drape taken.

52 (R p 94) Search of June 28, 1969, Exhibit 37, a drape taken.

53 (R p 94) Search of June 28, 1969, Exhibit 38, a drape taken.

54 (R p 94) Search of June 28, 1969.

55 (R p 94) Search of June 28, 1969, Exhibits 36, 37, 38, drapes taken.

64 (R p 101) Search of June 28, 1969, blood stains seen.

65 (R p 103) Search of June 28, 1969, Exhibit 36, a drape taken.

66 (R p 103) Search of June 28, 1969, Exhibit 37, a drape taken.

67 (R p103) Search of June 28, 1969, Exhibit 38, a drape taken.

68 (R p 103) Search of June 28, 1969, Exhibits 36, 37, 38, drapes taken.

71 (R p 104) Search of June 28, 1969, Exhibits 36, 37, 38, drapes taken.

169 (R p 146) Search of June 28, 1969, Exhibit 36, drape taken.

170 (R p 146) Search of June 28, 1969, Exhibit 37, drape taken.

171 (R p 146) Search of June 28, 1969, Exhibits 36 and 37, drapes taken.

172 (R p 147) Search of June 28, 1969, Exhibit 38, drape taken.

173 (R p 147) Search of June 28, 1969, Exhibit 38, drape taken.

176 (R p 148) Search of June 28, 1969, Exhibits 36, 37, 38, drapes taken, tests.

177 (R p 148) Search of June 28, 1969, Exhibits 36, 37, 38, drapes taken, findings.

178 (R p 150) Search of June 28, 1969, Exhibits

36, 37, 38.

179 (R p 150) Search of June 28, 1969, Exhibits 36, 37, 38.

236 (R p 168) Search of June 28, 1969, Exhibits 36, 37, 38, drapes, weights, hooks compare with weights, hooks from body, Exhibit 15.

237 (R p 168) Search of June 28, 1969, Exhibits 36, 37, 38, drapes, weights, hooks compare with weights, hooks from body, Exhibit 15.

238 (R p 168) Search of June 28, 1969, Exhibits 36, 37, 38, drape, weights, hooks compare with weights, hooks from body, Exhibit 15.

239 (R p 168) Search of June 28, 1969, weights from drape taken, Exhibit 87.

240 (R pp 168-169) Search of June 28, 1969, weights from drape taken, Exhibit 88.

241 (R p 169) Search of June 28, 1969, weights from drape taken, Exhibit 89.

242 (R p 169) Search of June 28, 1969, weights from drape taken, Exhibit 89.

244 (R p 169) Search of June 28, 1969, hooks from drape taken, Exhibit 91.

245 (R p 169) Search of June 28, 1969, hooks from drape taken, Exhibit 92.

246 (R p 170) Search of June 28, 1969, hooks and weights from drape taken, Exhibits 86 through 93.

247 (R p 170) Search of June 28, 1969, compare hooks and weights taken with those from corpse.

248 (R p 170) Search of June 28, 1969, compare hooks and weights taken with those from corpse.

249 (R p 170) Search of June 28, 1969, compare hooks and weights taken with those from corpse.

250 (R p 172) Search of June 28, 1969, compare hooks and weights taken with those from corpse.

251 (R p 172) Search of June 28, 1969, compare hooks and weights taken with those from corpse.

275 (R p 180) State offers all exhibits as a group.

ASSIGNMENTS OF ERROR IX AND XI, SECOND TRIAL, AS TO ALLOWING VERDICT OF MANSLAUGHTER

IX. In charging the jury that it could properly and lawfully in this case convict the defendant of manslaughter as shown by EXCEPTIONS NOS. 279 (R p 183), 280, 281, 282, 283, 284 (R p 185), 285, 286, 287 (R p 186), 287(a) (R pp 186-187), 289, 290 (R p and 291 (R pp 208, 210 & 212-213).

XI. In denying the defendant's motions to set aside the verdict that defendant was guilty of manslaughter as shown by EXCEPTIONS NOS. 292 and 293 (R p 215).

OPINION AND DECISION OF NORTH CAROLINA SUPREME COURT, SECOND APPEAL, 283 N. C. 249, 195 S. E. 2D 297

STATE of North Carolina

v.

Gloyd A. VESTAL.

No. 5.

Supreme Court of North Carolina.

April 11, 1973.

Defendant was convicted before the Superior Court, Guilford County, of murder in the second degree and he appealed. The Supreme Court, 278 N.C. 561, 180 S.E. 2d 755, ordered new trial. On re-

trial, the defendant was convicted before the Superior Court, Caswell County, J. William Copeland, J., of manslaughter and he appealed. The Supreme Court, Higgins, J., held that defendant could be convicted of manslaughter even though evidence of motive, number and seriousness of wounds, transportation of deceased's body to distant lake weighted down with log chains and effort to conceal fact that defendant had not made planned trip with deceased disclosed higher degree of homicide than manslaughter.

No error.

1. Homicide — 250

Defendant could be convicted of manslaughter even though evidence of motive, number and seriousness of deceased's wounds, transportation of deceased's body to distant lake weighted down with log chains and efforts to conceal fact that defendant had not made planned trip with deceased disclosed higher degree of homicide than manslaughter.

2. Criminal Law — 1172.7

If trial court charges on lesser included offense when all evidence tends to support greater offense, error is favorable to defendant and he is without standing to challenge lesser verdict.

3. Homidice — 340(3)

In homicide prosecution, definition of manslaughter instruction placing heavier burden upon State than is customary and usual was not prejudicial to defendant.

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This criminal prosecution originated by Guilford County Grand Jury indictment which charged Gloyd A. Vestal with the first degree murder of Angelo S. Pennisi. The indictment alleged the offense occurred on June 15, 1969.

The defendant was first brought to trial in Guilford County Superior Court on May 4, 1970. At the conclusion of a long trial, at which fifty-three witnesses testified for the State, the jury returned a verdict finding the defendant guilty of murder in the second degree. The court imposed a prison sentence of twenty-five years from which the defendant appealed. On review, this Court ordered a new trial for errors in the admission of certain evidence offered by the State.

On defendant's motion alleging unfavorable publicity, the court ordered the case removed to the adjoining County of Caswell.

At the new trial in Caswell County the State again offered evidence, the same in substance as that which this Court had held competent on the first appeal. Defendant concedes the competent evidence offered at the first trial was in substance repeated at the second trial. This concession permits the court to include that evidence herein by reference to the prior record. That evidence is accurately summarized in paragraphs number 1 through 18, pages 568-671, State v. Vestal, 278 N.C. 561-599, 180 S.E.2d 755. In addition, the State offered the following new evidence:

1. Mrs. Everage, an employee of an insurance agency, testified that at ten or eleven a.m. on the morning of June 16, 1969, the defendant came to

the office where she worked. "I said, 'What are you doing here, I thought that you were in Wilmington, Delaware with Mr. Pennisi.' " Mr. Vestal replied: "Sssh, I am supposed to be but I did not go, but please don't tell Rose [Mrs. Pennisi]."

2. Between the time of Mr. Pennisi's disappearance and the time his body was discovered in Lake Gaston, Officer Jenkins questioned the defendant who made the statement: "[T]hat the only business interest that he had with Mr. Pennisi was that he did owe Mr. Pennisi six thousand dollars for a Lincoln Continental automobile, but that this was a small sum compared to what he owed Mr. Pennisi in the past. That he had borrowed fifty thousand dollars at a time from Mr. Pennisi, but at the present time that he only owed him six thousand dollars."

3. The State introduced in evidence as Exhibits 10 and 11 two notes due by the defendant to Pennisi. One was for $70,000.00 and the other was for $40,879.37. Mr. Pennisi had placed these notes in the hands of Kenneth Lewis for safekeeping. Other evidence tended to show that the defendant was indebted to the deceased in a sum in excess of two hundred thousand dollars.

At the close of the evidence, the court, overruling the defendant's motion to dismiss, instructed the jury to render one of three verdicts: (1) guilty of murder in the second degree, (2) guilty of manslaughter, or (3) not guilty. The jury found the defendant guilty of manslaughter. From the court's judgment that the defendant be imprisoned for not less than eighteen nor more than twenty years he appealed, assigning errors.

Robert Morgan, Atty. Gen., by Howard O. Satisky, Asst. Atty. Gen., for the State.

Robert Blackwell, Yanceyville, and Cahoon & Swisher, by Robert S. Cahoon and James L. Swisher, Greensboro, for defendant appellant.

HIGGINS, Justice.

The court properly overruled the defense counsel's challenge to the sufficiency of the evidence to go to the jury on any degree of homicide. However, counsel makes these further contentions: (1) On the first trial the verdict finding the defendant guilty of murder in the second degree was an acquittal of the charge of murder in the first degree; (2) on the second trial the verdict finding the defendant guilty of manslaughter was an acquittal of the charge of murder in the second degree; (3) the evidence before the court was insufficient to support the verdict of manslaughter; (4) the court committed error in submitting manslaughter; hence, the verdict should be set aside, the sentence vacated, and the defendant discharged.

True, the verdict finding the defendant guilty of murder in the second degree eliminated murder in the first degree from the charge. For the same reason, the verdict finding the defendant guilty of manslaughter eliminated murder in the second degree from the charge.

[1] The legal question before us now is whether the verdict finding the defendant guilty of manslaughter and the judgment thereon may be sustained. In this connection, we concede the new evidence did not tend to reduce to manslaughter the

degree of guilt of the person who had killed Mr. Pennisi. The motive, the number and seriousness of the wounds, the transportation of the body to a distant lake weighted down with log chains, and the effort to conceal the fact the defendant did not make his planned trip to Delaware with the deceased, disclose a higher degree of homicide than manslaughter.

Examination of the record on the first trial shows the court instructed the jury to return one of four verdicts: (1) guilty of murder in the first degree; (2) guilty of murder in the first degree with a recommendation that the punishment be imprisonment for life in the State's prison; (3) murder in the second degree; (4) not guilty. Here quoted is defendant's Exception No. 348 to the charge: "The defendant excepts to the court's limiting the jury's verdict to exclude a verdict of manslaughter."

In all probability Judge Copeland had before him the record and the briefs as well as this Court's opinion on the first appeal. However, the fact the defendant objected to the failure of Judge Johnston to submit manslaughter on the first trial, may have induced Judge Copeland to submit manslaughter, even though evidence of manslaughter is lacking.

[2] In short, the defendant contends the evidence was insufficient to raise an issue of manslaughter, the court committed error in submitting that issue to the jury, and the verdict, being without evidentiary support should be set aside, the judgment vacated, and the defendant discharged. On the question thus presented, our decided cases follow the majority rule and hold that if the court charges on a

lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict.

"Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the state, and not to him." State v. Quick, 150 N.C. 820, 64 S.E. 168.

"The jury discarded defendant's plea, and if, as now argued by him, there was nothing in the evidence to warrant a verdict of manslaughter, it was the duty of the jury to convict of murder in second degree.

"It necessarily follows that, under such circumstances, the defendant cannot complain of a verdict for manslaughter, a lesser degree of homicide. An error on the side of mercy is not reversible." State v. Fowler, 151 N.C. 731, 66 S.E. 567.

In State v. Chase, 231 N.C. 589, 58 S.E. 2d 364, the Court citing State v. Quick, supra, said that a conviction of a lesser included offense of which there is no evidence is prejudicial to the State and the defendant has no just complaint. To like effect the Court cites State v. Matthews, 142 N.C. 621, 55 S.E. 342; State v. Fowler, supra; State v. Rowe, 155 N.C. 436, 71 S.E. 332; State v. Casey, 159 N.C. 474, 74 S.E. 625; State v. Blackwell, 162 N.C. 672, 78 S.E. 316.

In State v. Stephens, 244 N.C. 380, 93 S.E.2d 431,

the defendant was tried for murder. The jury returned a verdict finding the defendant guilty of manslaughter. The Court said:

"Evidence of manslaughter is lacking. The defendant, however, cannot complain that 'the jury, by an act of grace,' has found him guilty of a lesser offense. 'Such verdicts occur now and then, despite the efforts of the courts to discourage them. When they do . . . since they are favorable to the accused, it is settled law that they will not be disturbed.' State v. Bentley, 223 N.C. 563, 27 S.E.2d 738, 740; State v. Roy, 233 N.C. 558, 64 S.E.2d 840; State v. Matthews, 231 N.C. 617, 58 S.E.2d 625; . . . State v. Robertson, 210 N.C. 266, 186 S.E. 247." See also State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831.

The defendant contends he is entitled to an acquittal if the jury, with or without instruction from the trial judge, convicts of a lesser included offense when all the evidence tended to support a major offense. This proposition falls of its own weight. The defendant gains a new trial if the court fails to charge on a lesser offense of which there is evidence. The judge, therefore, must be alert to the danger of a new trial if he fails to charge on the lesser offense. In borderline cases, prudence dictates submission of the lesser offenses. To give the defendant absolution if the judge makes a mistake in his favor, would tend to put the judge on trial. Such is not the purpose of the law.

[3] The evidence, though circumstantial, was amply sufficient to sustain the jury's finding that the defendant was responsible for the killing of Angelo S. Pennisi. While Judge Copeland's definition of

manslaughter leaves something to be desired, nevertheless the definition placed upon the State a heavier burden than the customary and usual definition. The deviation, therefore, was non-prejudicial.

Other questions of law or legal inference not herein discussed are fully decided and the decision documented by this Court in passing on the first appeal.

The defendant's objections to the trial are not sustained. In the judgment we find

No error.